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## EU Law and Interest on Damages for Infringements of Competition Law

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OF LAW

# WORKING PAPERS

LAW 2016/11  
Department of Law

EU law and interest on damages for infringements of  
competition law – A comparative report

Edited by Giorgio Monti



European University Institute  
**Department of Law**

**EU LAW AND INTEREST ON DAMAGES FOR INFRINGEMENTS  
OF COMPETITION LAW – A COMPARATIVE REPORT**

Edited by Giorgio Monti

EUI Working Paper **LAW** 2016/11

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## **Abstract**

This long working paper (EUI interest study) explores the differences between national legal systems and assesses whether they are EU law compliant when it comes to the calculation of interest on damages resulting from antitrust infringements. The first chapter of the working paper addresses three issues: the principles that emerge from the case law of the CJEU when assessing the compliance of national rules in damages actions; the principles that emerge from EU legislation and the case law of the CJEU when considering the notion of interest payments; an assessment, based on the EU law system, of thirteen member state approaches to interest. The subsequent chapters are national reports which form the basis for the assessment to be found in chapter 1. We note that many legal systems require some reconsideration of the national approach to interest to ensure that claimants are afforded full compensation. This study comes at a time when the 28 EU member States are in the process of implementing Directive 2014/104/EU, without however being very specific on the calculation of interest. In presenting the specific features of thirteen national regimes, this working document provides guidance to all interested parties on the scope of interest as fundamental part of the EU right to full compensation. It might prove especially useful to judges in cases that call for the application of foreign laws to damages claims.

This EUI interest study has been initiated and supported by CDC Cartel Damage Claims Consulting SCRL, Brussels with the aim to extend the study to the legal systems of all other EU Member States. It seeks to raise awareness of the substantial differences and potentially significant consequences thereof for the right to full compensation of damages following infringements of competition law.

## **Keywords**

EUI interest study, private enforcement of competition law, right to full compensation, accrual of interest on damages amounts, principle of effectiveness

## **Overview**

### **EU LAW AND INTEREST ON DAMAGES FOR INFRINGEMENTS OF COMPETITION LAW**

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## EU law and interest on damages for infringements of competition law

Barend Van Leeuwen\* and Giorgio Monti\*\*

The purpose of this report is to consider how EU law might impact on the way interest claims are handled in damages claims brought in the national courts. The focus is on pre-judgment interest. This may be defined as ‘interest awarded from the day when payment fell due until judgment is entered or payment made (whichever is the earlier).’<sup>1</sup> It is divided into three parts.

Part 1 considers the CJEU case law in competition cases raising issues pertaining to private enforcement. None of these cases addressed the matter of interest calculation in detail, so our approach here is to identify certain general principles and explore how these might affect future judgments of the Court on the matter of interest calculation, as well as on other matters left open by the Court and by the Competition Law Damages Directive.<sup>2</sup>

Part 2 seeks to concretise the results found in the first part by turning to four fields of EU Law where EU legislation or the Court of Justice of the European Union (CJEU) have considered the issue of interest in a more meaningful manner. These fields are the Late Payment Directive 2011/7/EU, state aid, non-contractual liability of the Union, and recovery of unlawfully levied charges.

Part 3 draws on the findings of the previous parts to assess how far the legislation and the approach of the courts in thirteen national jurisdictions fares when assessed on the basis of EU Law. This part draws on the national reports that form the subsequent chapters of this working paper.

### ***Part 1. The Court of Justice and private antitrust enforcement: implications for national rules on interest***

#### Scope

1. In this section of the report we review the case law of the CJEU pertaining to private enforcement and detect a set of themes that arise which give a sense of the policy considerations and the lines of argument that the Court tends to follow. The aim is to discover how the Court reacts when faced with national rules that affect the prospects of private enforcement. This can allow us to assess what the CJEU might say when a national rule on interest is evaluated for compliance with EU Law.
2. In taking this approach, we take the view that the existing dividing lines which the CJEU and commentators have drawn have become unhelpful. For instance, the distinction between matters of EU Law and matters for national procedural autonomy is so blurred as to lose much significance. Similarly, when considering matters of national procedural autonomy, the principle of equivalence is less significant than the principle of effectiveness. The result is that effectiveness governs both matters of EU Law and matters of national law. We explore this

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<sup>1</sup> Law Commission of England and Wales ‘Pre-Judgment Interest on Debts and Damages’ Law Com 287 (2003) p.1.

<sup>2</sup> Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringement of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1.<sup>3</sup> N. Reich, *General Principles of EU Civil Law* (Intersentia, 2014) ch.4.

point more fully below. The approach used here is similar to that considered by Norbert Reich, who argues that EU Law is used to ‘upgrade’ rules of national civil law.<sup>3</sup>

3. The Court has rendered a small set of judgments that are of relevance for this discussion, but enough to support the generalisations below. The cases considered are six: *Courage v Crehan*,<sup>4</sup> *Manfredi*,<sup>5</sup> *Pfleiderer*,<sup>6</sup> *Donau Chemie*,<sup>7</sup> *Otis*,<sup>8</sup> and *Kone*.<sup>9</sup> All of the judgements were replies to a reference for preliminary ruling. With the possible exception of *Manfredi* and *Otis*, the judgments concern a situation where national law restricted the claimant’s possibility to secure compensation, and where the CJEU ruled on how far national rules could remain as they were. *Manfredi* and *Otis* instead are cases where for the most part the national court wished for clarifications without there being a precise obstacle at national level which the judge felt prevented the claim.
4. The section is structured as follows: in section 2 we list the principles that emerge, and tie them to the judgments; in section 3, for completeness and balance, we try and explore what arguments have not yet been tried and which might affect the CJEU in future cases. For each consideration we explain what it means when one wants to ‘test’ how far a rule of national law may fare if challenged on the basis of its non-compliance with EU Law. In the final paragraph of each section we offer some remarks about how the principle may be applied to challenge certain rules of national law pertaining to interest awards.

## Principles that emerge from the case law

### *Principle 1: Effective right to full compensation*

5. One principle that emerges clearly from the case law of the European Courts is the right to effective, full compensation for victims of infringements of EU competition law. This principle is relevant to interest as it is a sum that is relevant to estimating if full compensation is awarded.<sup>10</sup> National law must provide harmed persons with an effective way to obtain compensation of the harm suffered by the claimant due to the infringement of EU competition law. National rules that would make obtaining full compensation impossible or exceedingly difficult must be set aside. *Kone* is a case in point. *Kone* concerned the question of whether a provision of Austrian law could be upheld that categorically ruled out claims for damages suffered when buying the cartelized product or service from non-cartel members. The Court held that, if the cartel caused (umbrella) damages - a question that has to be decided by the national court in the light of the evidence presented by the parties - categorically excluding liability for (part of) the damage by law would make obtaining full compensation impossible.
6. Regarding interest specifically, the Court held in *Manfredi* that an interest award ‘made in accordance with the applicable national rules constitutes an essential component of compensation.’<sup>11</sup> This statement draws on an earlier judgment in the field of sex

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<sup>3</sup> N. Reich, *General Principles of EU Civil Law* (Intersentia, 2014) ch.4.

<sup>4</sup> Case C-453/99 *Courage v. Crehan* [2001] ECR I-06297.

<sup>5</sup> Joined Cases C-295/04 to C-298/04, *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others*. [2006] ECR I-6619.

<sup>6</sup> Case C-360/09 *Pfleiderer AG v. Bundeskartellamt* [2011] ECR I-05161.

<sup>7</sup> Case C-536/11 *Bundeswettbewerbshörde v Donau Chemie AG and Others* Judgment of 6 June 2013.

<sup>8</sup> Case C-199/11 *Europese Gemeenschap v Otis NV and Others*, Judgment of 6 November 2012.

<sup>9</sup> Case C-557/12 *Kone AG and Others v. ÖBB Infrastruktur AG*, Judgment of 5 June 2014.

<sup>10</sup> E.g. *Manfredi* paragraph 95, *Donau Chemie* paragraph 24.

<sup>11</sup> *Manfredi*, paragraph 97.

discrimination.<sup>12</sup> This statement is a little slippery: it seems to assume that provided interest is calculated on the basis of applicable national rules then it is acceptable. However, it would not be wise to read this statement in this way. The better view is that the method of calculation of damages and interest is subject to the principle of effectiveness (and perhaps equivalence but as we show here, this is less significant).<sup>13</sup>

7. On the basis of the foregoing, the following points may be made:
  - It might be argued that the rate of interest set by a State can be challenged on the basis of a lack of effectiveness, if it is considered to be too low; in particular if it is considered that the award fails to compensate the victim adequately for the losses suffered.
  - Likewise, if interest is not calculated from the date of the harm, it is plausible to argue that this would lead to ineffective protection of the claimant. This also finds support in some of the case law noted in part 2, below.<sup>14</sup>
8. A point that has been present since the seminal ‘direct effect’ case (*van Gend en Loos*) is that damages claims serve to enhance the effectiveness of EU Law. In paragraphs 23 and 24 in *Donau Chemie* the Court notes that a damages claim serves both the working of the competition rules and to afford effective protection to the rights of individuals who suffer loss. *Donau Chemie* appears to clarify the more ambivalent position in *Courage v Crehan* where it was not clear if the main purpose of damages was to compensate the right holder or deter cartel members. Both roles matter and are seen as mutually reinforcing each other: full compensation creates the incentive to sue, and civil liability enhances deterrence.

#### *Principle 2: Bright line rules are disfavoured*

9. The clearest indication of this principle comes from the two cases pertaining to the right to access leniency documents (*Pfleiderer* and *Donau Chemie*). In both the ECJ held that ‘national courts must weigh up the respective interests in favour of disclosure of the information and in favour of the protection of that information.’<sup>15</sup> In *Donau Chemie* the Court explained how this balancing exercise had to be performed document-by-document. It may also be said that the tenor of the judgment is such that the national court should tend to favour claimants,<sup>16</sup> but for present purposes the point in both judgments is that a de jure (*Pfleiderer*) or de facto (*Donau Chemie*) absolute protection of documents is not allowed.
10. The same principle underpins the main issue that the national court had raised in *Courage v Crehan*. Here, under English law, illegality was a complete defence to a damages claim, and the Court, after noting the two functions of damages claims (compensatory and deterrent) stated that ‘[t]here should not *therefore* be any absolute bar to such an action being brought by a party to a contract which would be held to violate the competition rules.’<sup>17</sup> Here the Court seemed to say that absolute bars on liability are prohibited because they would harm the goals sought by

<sup>12</sup> Case C-271/91, *Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-4367: ‘full compensation for the loss and damage sustained as a result of discriminatory dismissal cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value. The award of interest, in accordance with the applicable national rules, must therefore be regarded as an essential component of compensation for the purposes of restoring real equality of treatment.’ (paragraph 31).

<sup>13</sup> This follows from paragraphs 98 and 100 in *Manfredi*.

<sup>14</sup> This is implied in Case C-271/91 *Marshall* and also in Case C-63/01, *Evans v The Secretary of State for the Environment, Transport and the Regions, and The Motor Insurers’ Bureau* [2003] ECR I-14447, see paragraphs 70-71 where the assumption is that interest starts to run from the time the injury occurs.

<sup>15</sup> *Donau Chemie* paragraph 30

<sup>16</sup> ‘It is only if there is a risk that a given document may actually undermine the public interest relating to the effectiveness of the national leniency programme that non-disclosure of that document may be justified.’ *Donau Chemie*, paragraph 48

<sup>17</sup> *Courage v Crehan* paragraph 28 (emphasis added).

the right to damages. The Court then went on to explain that the national court may deny a right to damages either to prevent unjust enrichment of the claimant, or because the claimant bears a ‘significant degree of responsibility’ that he does not merit compensation.<sup>18</sup> In other words, a case-by-case analysis of the claimant’s illegal conduct is required and only when a certain threshold is crossed will it be appropriate to deny that claimant a damages claim.

*Kone* follows a similar line. Austrian law denying liability for umbrella pricing was condemned for creating an absolute bar for claiming a part of the damage. If a claimant establishes the adequate causal link between elevated prices by non-cartel members and the cartel, the cartel members are liable for those damages

11. Based on the approach in these cases, the following points may be considered:

- a) In Italy, a party seeking interest is able to make a case that a higher rate should be paid. It may be argued that jurisdictions that do not provide for this opportunity fail to grant effective protection, and the principle in the cases above would support this line: absolute limits on the level of interest cannot ensure effective protection of the claimant’s interest.
- b) The opposite may well also apply; that is to say, a defendant might argue that in the circumstances the default interest rate set is too high, in light of the claimant’s actual loss. In this setting courts should have the capacity to intervene to adjust the interest rate downwards.
- c) Similarly, a jurisdiction which applies set interest rates to calculate the interest, and that does not allow a plea for compound interest at all, or has rules which de facto make such a plea impossible may also be challenged for failing to provide for effective protection to the claimant’s interest.

*Principle 3: Policy considerations against liability generally ignored*

12. The Court takes little heed of policy considerations that may militate against the imposition of liability. In the leniency cases (*Pfleiderer* and *Donau Chemie*), the court denying access has to give reasons to explain why access would harm public confidence in the leniency system, which seems quite hard to show. In *Kone* the Court did not even reply in an accurate way to the argument that leniency applicants would be influenced by extending liability to umbrella purchasers.<sup>19</sup> This issue is now perhaps moot with the advent of the Damages Directive.
13. In *Courage v Crehan* and in *Kone* the Court was uninterested in the status of national law or in any good reason why illegality was a complete defence in England and Wales or why damages for umbrella pricing were too remote. True, the illegality defence had been recently reviewed by the Law Commission of England and Wales and it appeared that the position in Austrian law for umbrella pricing liability was not settled, at least insofar as the secondary literature is concerned. However in neither these, nor in the other cases, does the Court ask itself if there is any good reason for the position in national law.

*Summary*

14. In case the unresolved matter is one of European Union Law, then the guiding thread from the principles and the style of reasoning of the case law is that any development must go in the direction of enhancing the ease with which the claimant may secure full compensation. Insofar as the matter is one of national law, then the guiding principle is the same: any national rule which risks jeopardizing effective enforcement of competition law or the effective protection of rights is likely to be challenged. Accordingly the source of the dispute is less important to the

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<sup>18</sup> *Courage v Crehan*, paragraph 31.

<sup>19</sup> Its reply here was completely unrelated to the objection made.

Court than the importance afforded to the effective protection of the claimant, and this informs all the four principles noted above.

Considerations that have yet to be addressed fully

#### *Justifications for national rules*

15. Above we suggested that the CJEU, so far, has not been receptive to arguments that favour the retention of national rules that limit the claimant's right to full compensation. Instead it has, incrementally devised principles that strengthen claimants' rights to secure full compensation. The *Otis* judgment, however, reminds us that fundamental rights considerations may affect the development of EU Law. It will be recalled that in this case the question arose whether the European Commission could have standing to seek damages in a case that it had originally brought. The Court decided that Article 47 of the Charter of Fundamental Rights had no bearing insofar as the procedural protection of firms accused of the cartel when the Commission was acting as competition authority applying Article 101 were safeguarded. Accordingly the Commission could seek damages. While not challenging the judgment, the point to emphasise is that the Court began with the premise that anyone may seek damages, and then examined whether there might be any argument based on the Charter to deny the right to compensation. It follows that future challenges against the CJEU's expansive interpretation of the right to damages remain possible. However, it is also the case that arguments against expanding liability have not been made in a convincing manner in the case law to date.<sup>20</sup> Therefore, it remains to be seen whether a highly-regarded rule of national law which limits the liability exposure of the defendant might be upheld.
16. One consideration, which might be added, is that it would appear unwise for one to claim that the CJEU lacks the competence to 'upgrade' national laws. For instance, some may take the view that in *Kone* it was not up to the Court to determine if umbrella pricing led to liability. If one follows this line of thought, however, then even *Manfredi* is ultra vires, and it looks incredible to find that the Court would be receptive to this line of argument, however dogmatically correct it may be: it would frustrate the way the Court has developed private litigation.
17. Another similar argument that may not fare well is to argue that creating a special rule for competition cases is unfair. Suppose one challenges the rate of interest on the basis that it is too low. As most Member States set out the rate of interest through an official procedure and that rate applies across the board, a finding that for the purposes of competition law claims the rate is too low would cause havoc. Insofar as historical claims are concerned, probably the principle of legitimate expectations would serve to prevent a revision of the earlier rates. But how could a legislature cope going forward? Would it have to issue two rates: one for EU antitrust claims and one for others? It is not clear how the Court might respond to the claim that a judgment of the CJEU could cause the legislator significant difficulties. In principle, this is more a 'political' issue for effectiveness of EU Law trumps such considerations. It will be obvious that a good number of EU directives in private law create special rules distinct from the general civil law; in fact the Damages Directive itself does so with respect to limitation periods and joint and several liability.<sup>21</sup> However, to our knowledge the Court has not received an argument that the disruption that this may cause is unfair. This line of argument likely suffers from the same weaknesses as the 'lack of competence' issue discussed in paragraph 23 above, but it is striking to us that this kind of policy argument has not been made forcefully. The argument would however be complicated to make, for one would have to demonstrate the underlying

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<sup>20</sup> In *Kone*, this was the impression of the Advocate General.

<sup>21</sup> Directive 2014/104, Articles 10 and 11



policy choices of the national legislator, and how these would be harmed by an ad hoc harmonisation by the EU legislature or by the Court.

*Risk of over-compensation or over-exposure*

18. The Court, since *Courage*, has agreed that damages should not lead to a party's 'unjust enrichment.' It is not exactly clear what this means on the facts of that case. If one reads this phrase broadly, it may be argued that a modification of a national rule which would raise the damages payable could be challenged for enriching the claimant beyond what is necessary to compensate him. But this reading has to be qualified by the statement in *Manfredi* that a Member State may decide to award punitive damages. It remains open however to say that a particular interpretation of national law on compensatory damages risks giving too much to the claimant, at the expense of the defendant.
19. An example might be a possible challenge against a jurisdiction that fixed the rate of interest without the possibility of revising this rate downwards. If so the national rule risks unjustly enriching the claimant at the expense of the defendant.

*Impact of the Damages Directive on adjudication*

20. All of the cases discussed above were rendered before the Damages Directive. However, the general stance taken by the Court in the case law discussed above will likely remain for the following reasons.
21. First, the Directive merely provides that pre-judgment interest should be paid, see Article 3(2). True, recital 12 provides a detailed account of the nature of this claim, but the relevant text is not found in the Articles, nor is 'interest' defined in Article 2. The relevant text, reproduced here is curious:

The payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time and should be due from the time when the harm occurred until the time when compensation is paid, without prejudice to the qualification of such interest as compensatory or default interest under national law and to whether effluxion of time is taken into account as a separate category (interest) or as a constituent part of actual loss or loss of profit. It is incumbent on the Member States to lay down the rules to be applied for that purpose.

This precision finds no reflection in the Articles of the Directive. At best the recital may be used as a source of interpretation of the Directive, but it is no more a source than the principle of effectiveness.

22. Second, the Directive does not purport to cover all aspects of a damages claim. This means that, like in *Manfredi*, the ECJ is free to continue to develop liability rules. For instance, it remains unclear whether liability is strict or based on fault.<sup>22</sup> Article 17(2) of the Damages Directive provides a presumption that cartels cause harm, but this point goes to causation only and does not say anything about the role of fault. In the context of interest, the Directive says hardly anything more than *Manfredi*, so the ECJ is free to supplement the legislative text in such a way as to give more substance to the role of interest payments and therefore challenge rules of national law that go against the role of interest that the Court identifies.
23. Third, the Court has in the past even overridden express statutory wording to impose its vision of the remedies that are required. In *Sturgeon* the Court extended liability under the Air Passenger Regulation in a manner that many considered beyond the legislative text, and was

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<sup>22</sup> A literal reading of *Manfredi* might suggest that the Court believes liability is strict but AG Kokott in *Kone* took the view that the matter remained to be settled. For infringements of Article 102 TFEU, this distinction might have some relevance. Arguably this is different for cartel cases, as it is hard to imagine how cartelists cannot be at fault.

achieved by a purposive interpretative stance.<sup>23</sup> Reading this together with Article 47 of the Charter of Fundamental Rights might lead some to argue that the CJEU has considerable latitude to shape the way liability rules develop even when secondary legislation is present.

**Part 2: EU legislation and case law on interest – lessons for antitrust damages claims?**

24. This part of the report analyses legal instruments which deal specifically with the award of interest on EU law claims. The overall aim of the report is to analyse what, if any, EU law principles are applicable to claims for interest on damages. The idea is not to explore abstract legal principles of EU Law. Rather, by reviewing the case law closely and in a balanced manner, the report tries to elucidate the criteria by which interest issues are considered by the Court. The report does not take the view that there are overarching considerations applicable to all fields of EU Law – with this limit the report tries to explore what general lessons this case law may provide.
25. As a starting point for the research, a thorough search of the CJEU's case-law has been undertaken. The relevant search terms were "interest" and "damages", "interest rate", "compound interest" and "simple interest". Cases which were mentioned or relied on in these cases but which did not come up as search results were also checked. On the basis of this preliminary search, it became clear that there are three main areas of EU law in which interest and interest rates have been discussed by the CJEU or the General Court:

- State Aid Law
- Non-Contractual Liability of the EU
- Recovery of Unlawful Charges

In addition, the EU has adopted the Late Payment Directive,<sup>24</sup> which will be discussed separately. Some areas of law in which questions could arise about interest or interest rates are not discussed in this report. They include State liability, private liability for breaches of the free movement provisions and public procurement.<sup>25</sup> In these areas of law there has not been a real discussion about interest and interest rates. There was also a number of staff cases in which the CJEU referred to the applicable interest rate.<sup>26</sup> However, these cases were based on the interest rate which was agreed in the employment contract between the staff member and the EU. Since the basis for the award of interest in these cases was purely contractual, they are not helpful to analyse the general EU law position on the award of interest. For that reason, staff cases will not be discussed in detail here.

26. The conclusion of this report is that EU law, in particular the principles of effectiveness and equivalence of EU law, limits the discretion of national courts in awarding interest on damages claims brought under EU law. Three main conclusions can be drawn from the case law.
- Interest is an integral part of the right to claim damages.<sup>27</sup>
  - Interest should be awarded for the full period from the moment of the harm to the date of payment of the damages.

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<sup>23</sup> Joined Cases C-402/07 and C-432/07, *Sturgeon and others v Condor and others*. See in particular the interpretative stance at paragraphs 47-49.

<sup>24</sup> Directive 2011/7/EU on combating late payment in commercial transactions [2011] OJ L48/1.

<sup>25</sup> See, for example, Case C-568/08, *Combinatie Spijker Infrabouw and others v Province Drenthe*, ECLI:EU:C:2010:751.

<sup>26</sup> See, for example, Case T-99/07P, *Commission v Genette*, ECLI:EU:T:2008:605, and Case F-61/07, *Bauch v Commission*, ECLI:EU:F:2009:144.

<sup>27</sup> In Case 238/78 *Ireks-Arkady* [1979] ECR 2955, paragraph 20 (a case about the Union's non-contractual liability) the existence of entitlement to interest was inferred from the general principles of law common to the legal systems of the Member States.

- National courts have a discretion whether to award simple or compound interest, which should be exercised in compliance with the principles of effectiveness and equivalence. Effectiveness means that national courts should award what is necessary to provide “adequate compensation” to claimants.
27. Following up on this last point, it means that, as a matter of EU law, national law should probably provide for the possibility of compound interest being awarded on damage claims. National legislation which completely excludes the possibility of compound interest might well be in breach of EU law, since in certain cases it might make the recovery of full compensation excessively difficult. As a consequence, such national legislation could breach the principle of effectiveness, and possibility also Article 47 of the Charter of Fundamental Rights (“the Charter”). However, this argument cannot be made *in abstracto* – it has to be shown in a particular case, on the basis of concrete evidence, that the award of compound interest is necessary to provide a victim of breaches of competition law with adequate compensation. It is arguable that if a claimant in one kind of dispute (e.g. a damages claims based on the excess charges paid by a business buying from a cartel) shows that in this scenario the normal conduct of the claimant had he not paid the overcharge would be to invest the money or keep it in a bank, that then the compound rate of interest is to be applied in all such kinds of cases for it is likely that the claimant borrowing (or depositing) money in a bank would be charged (or receive) compound interest. In other words, a claimant may convince the courts that there is a presumption that compound interest rates should be used in certain types of damages claims. This would ease the claimant’s task by making it necessary for the defendant to reveal why this higher rate of interest would over-compensate the claimant.

#### Late Payment Directive 2011/7/EU

28. In 2011 the EU adopted a directive on late payment in commercial transactions. Directive 2011/7/EU (“Late Payment Directive”) applies to contractual transactions between businesses as well as to transactions between businesses and public authorities. It is therefore not directly applicable to tort claims, such as infringements of competition law. The Late Payment Directive had to be implemented in national law by 16 March 2013.
29. The Late Payment Directive aims to regulate a number of aspects of late payment. First of all, it provides that the period within which public authorities have to pay for goods and services should be 30 days. In exceptional circumstances, public authorities are given 60 days. Secondly, the Late Payment Directive stipulates that businesses have to pay their invoices in 60 days unless certain exceptional circumstances apply. Thirdly, businesses are automatically entitled to claim interest for late payment. The statutory interest rate fixed by the Member States should be at least 8 percentage points above the European Central’s Bank reference. A list of the interest rates awarded in Member States is available on the website of the Commission.<sup>28</sup> There is some variation in the statutory interest rates applied by the Member States – the Czech Republic has the lowest interest rate (8.05%) while Croatia has the highest rate (12.29%). It is important to note that the Late Payment Directive only constitutes minimum harmonisation – Member States are entitled to adopt provisions which are more favourable to the creditor.
30. According to Article 2(6) and recital 15 of the Late Payment Directive, interest which is awarded on late payment is simple interest. The UK’s Users Guide for the Late Payment Directive makes it clear that the formula to calculate the interest is as follows: Debt \* interest rate \* (the number of days late/365). How this works out in practice can best be illustrated by an example. An English business has to pay 10,000 pounds to another English business for the

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<sup>28</sup> See [http://ec.europa.eu/enterprise/policies/single-market-goods/fighting-late-payments/index\\_en.htm](http://ec.europa.eu/enterprise/policies/single-market-goods/fighting-late-payments/index_en.htm), last accessed on 18 March 2015.

provision of certain goods. However, it is now 30 days late (i.e. 30 days after the period of 60 days which is allowed for payment). In such a case, the total interest to be paid would be  $10,000 * 0.085 * (30/365) = \text{about 70 pounds}$ .

31. As indicated above, the Late Payment Directive does not apply to tort claims, such as damage claims resulting from infringements of competition law. By contrast, some national regimes apply interest that is called similarly (e.g. “penalty interest”, “interest for delay”, “late payment interest”, “interest for default”), that also applies to tort claims, as discussed in the national reports.
32. As indicated above, there are no lessons here for antitrust claims. The regime set out in this Directive is motivated by a wish to stimulate prompt payment.

#### State aid law

##### *A codification of interest rules*

33. If the Commission finds that a party has received unlawful State aid, it will order the Member State which has granted the aid to recover the aid in question. The aim of the recovery is to restore the previously existing situation in the market. The recipient of the State aid has received an unlawful advantage which now has to be recovered. As a result, fair competition in the market will be restored. As such, it is important to note the difference between interest on the recoverable amount of State aid and interest on damages claims for breaches of the competition law provisions. With respect to State aid, the interest is calculated over an amount of money which the recipient has unlawfully received. In such cases, the amount of interest increases the amount of money that the recipient should pay back. Note that the aim of the remedy is to strip the beneficiary of its gain and not to compensate the State for its loss.
34. As a result, the remedy is conceptually different from a claim for damages in which the interest increases the amount of damages which should be paid to compensate the victim. The purpose of the calculation of interest in State aid cases is to reflect that the recipient *had* a certain amount of money available for use which they should not have had available – the approach is based on restitution (analogous to unjust enrichment). For damages claims in competition law, the purpose of the calculation of interest is to reflect that the claimant did *not* have a certain amount of money available which they should have had available – the approach is compensatory. This conceptual difference for the award of interest is important, since it could be relied on to justify different interest regimes for State aid cases and competition law claims.
35. The principles for the calculation of the amount of State aid which should be recovered have been laid down in Commission Regulation 794/2004.<sup>29</sup> Article 9 provides that the Commission is responsible for fixing the interest rate for each Member State on the basis of the average of the five-year inter-bank swap rates plus 75 basis points. Article 11(1) of the Regulation provides that “the interest rate to be applied shall be the rate applicable on the date on which unlawful aid was first put at the disposal of the beneficiary”. It follows interest is payable from the moment the aid is received.<sup>30</sup> Furthermore, Article 11(2) provides that “the interest rate shall be applied on a compound basis until the date of the recovery”.

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<sup>29</sup> Commission Regulation 794/2004 implementing Council Regulation 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty.

<sup>30</sup> For discussion of this point, see Case T-35/99 *Keller and Keller Meccanica SpA v Commission* [2002] ECR II-8717, paragraphs 36-40

36. The Regulation codifies a good number of the issues pertaining to interest in this field, but not all. The case law also seems to provide that there may be scenarios where it may be inappropriate to include interest in the repayment order. This is neither reflected in Regulation 794/2004, nor in the Procedural Regulation. An exception to the obligation to pay interest was identified in the *Magfesa* case.<sup>31</sup> In brief, the Commission issued a recovery order against an undertaking that had been declared insolvent. Under Spanish Law in force at the time the debts of undertakings that have become insolvent no longer earn interest from the time of insolvency. The Court reasoned that the Spanish Law was well founded (it protected all creditors because it did not over burden the assets of the insolvent firm) and that as a result the Commission was not entitled to seek repayment of interest after the beneficiary had been declared insolvent.<sup>32</sup> For present purposes, the significance of this judgment is that even though secondary legislation codifies the right of the Commission to order recovery of the benefit plus compound interest, there remain circumstances where the codification has proven insufficient to cover all events.
37. Having said that, it would of course have been desirable if the Competition Law Damages Directive had included a more articulated codification of the rules on interest. However, as we showed above the best the legislator was able to do is canvass some principles in the recital.

### *Compound Interest*

38. In its decisions in which it orders recovery, the Commission does not normally calculate the precise amount of interest which is to be paid. It will simply refer to Article 9 of the Regulation and reiterate that the aid is to be calculated on a compound basis. However, it will set out precisely what the recoverable amount is and from which date the interest should be calculated.
39. The main question is whether the application of compound interest in State aid law is based on a long-standing practice of the Commission, or possibly on some sort of general principle of EU law. Recital 14 of Commission Regulation 794/2004 provides the following explanation: "Given the objective of restoring the situation existing before the aid was unlawfully granted, and in accordance with general financial practice, the recovery interest rate to be fixed by the Commission should be annually compounded." This is in line with the earlier Commission Communication on the interest rates to be applied when aid granted unlawfully is being recovered.<sup>33</sup> This Communication, which was a prelude to Commission Regulation 794/2004, explains that the question whether interest should be calculated on a simple or compound basis should be "urgently clarified".<sup>34</sup> According to the Commission, the use of compound interest "appears necessary to ensure that the financial advantages resulting from this situation are fully neutralised".<sup>35</sup> The Communication provides that interest should be calculated on a compound basis – "unless this would be contrary to a general principle of Community law".<sup>36</sup> Here, the Commission probably refers to the general principle of protection of legitimate expectations. The intention of the Commission to calculate interest on a compound basis has now been codified in Article 11(2) of Commission Regulation 794/2004.
40. The Regulation clarifies that the decision to calculate interest on a compound basis is very much a unilateral decision taken by the Commission. The controversy surrounding the use of

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<sup>31</sup> Case C-480/98 *Spain v Commission* [2000] ECR I-8717

<sup>32</sup> See the discussion at paragraphs 32 to 39. And see also the discussion of the Advocate General.

<sup>33</sup> Commission Communication on the interest rates to be applied when aid granted unlawfully is being recovered ((2003/C 110/08)).

<sup>34</sup> *Ibid.*, 21.

<sup>35</sup> *Ibid.*, 22.

<sup>36</sup> *Ibid.*, 22.

compound interest is illustrated by the case of *Département du Loiret*.<sup>37</sup> In this case, the Commission took a decision in 2000 in which it implicitly ordered France to calculate the interest on a compound basis. This constituted a departure from the Commission's previous practice. At the time, there was no legislation in place on the basis of which the interest could be calculated on a compound basis. The Commission's decision was challenged by the French region. The Commission claimed that the calculation of compound interest was necessary to achieve the situation pre-existing before the aid. However, the General Court (then the Court of First Instance) had no difficulties in annulling the decision to award compound interest on the basis that the Commission had failed to provide reasons for its change of practice and to justify why compound interest should be used in this case.

41. In *Département du Loiret*, the General Court found that “at the date of the contested decision there was no rule stating that the rate of interest provided for in recovery orders would be compound and that the Commission was not in the practice of imposing compound interest in recovery orders.”<sup>38</sup> Moreover, it held that “the imposition of compound interest in the present case was the first manifestation of a new and important policy of the Commission which the Commission wholly failed to explain.”<sup>39</sup>
42. This part of the judgment was upheld on appeal by the CJEU.<sup>40</sup> It shows that, in the absence of a statutory basis to calculate interest on a compound basis, the Commission was required to provide reasons and to justify its decision to impose the calculation of interest on a compound basis. Moreover, it provides evidence that there was no long-standing practice in State aid law to calculate interest on a compound basis. Article 11 of Commission Regulation 794/2004 is not based on years of consistent practice by the Commission. It does not reflect a general principle of EU law. Rather, it is part of the Commission's overall policy to strengthen the recovery remedy. The *aim* of this change is important, because it can also be applied to competition law. The aim of awarding damages in competition law is also to restore the claimant's position in the market by awarding damages to compensate for the breaches of competition law. On that basis, it could be argued that the Commission's practice in State aid law provides evidence that under certain circumstances, compound interest is necessary to ensure effective enforcement of EU Law.
43. It should be noted that the Italian Supreme Court has referred a question to the CJEU on the EU law compliance of national legislation which provides for the recovery of compound interest in State aid law cases: Case C-89/14, *A2A SpA v Agenzia della Entrate*. The Commission took a decision on Italian State aid in 2002. Italy had failed to recover this aid, and then it passed legislation requiring that the beneficiary had to repay the aid plus compound interest. The Italian legislator made reference to Regulation 794/2004. However, Article 13 of the Regulation provides that “Articles 9 and 11 shall apply in relation to any recovery decision notified after the date of entry into force of this Regulation”. The Regulation came into force in May 2004 – two years after the Commission decision in this case. The question is if the Italian legislation can provide for the recovery of compound interest also before May 2004. As such, there is an important link to *Département de Loiret*. The question is also whether the general principle of the protection of legitimate expectations precludes the retrospective effect of Article 11 of Commission Regulation 794/2004.
44. Advocate General Wathelet issued his Opinion on 25 March 2015, where he said that the compound rate of interest is a better means of ensuring an effective remedy. Moreover, he suggested that nothing stopped the Italian legislator from setting an interest rate different from

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<sup>37</sup> Case T-369/00, *Département de Loiret v Commission*, ECLI:EU:T:2007:100.

<sup>38</sup> *Département de Loiret*, above n 10, para 38.

<sup>39</sup> *Département de Loiret*, above n 10, para 43.

<sup>40</sup> Case C-295/07 P, *Commission v Département du Loiret and Scott SA* [2008] ECR I-9363.

that foreseen by the EU rules in force at the time. Matters might be different if it was found that Italy had discriminated against this beneficiary and had not used the compound interest rate for other recovery orders after the one of the applicant. The whole judgment is somewhat surreal: the Italian legislator had no reason to make reference to the EU rules, since there was no requirement to transpose anything; it enacted the legislation simply because it wished to overcome the state's inertia in obeying EU rules. While the matter seemed purely domestic, there was an EU law hook, which allowed the applicant to raise 'defences' grounded in EU law. Unfortunately the CJEU does not see this litigation tactic as undesirable. The Court issued its judgment on 3 September 2015 and followed the views of its Advocate General, finding that Italy was entitled to pass legislation to require the recovery of state aid with compound interest. For the purposes of this report what is particularly relevant is that the Court stated that, in light of the long delay between the Commission decision (2002) and the issuing of the recovery order (2009), 'it must be considered that the application of compound interest is a particularly appropriate means of neutralising the competitive advantage granted unlawfully to undertakings benefitting from that State aid.'<sup>41</sup> It follows that the Court takes the view that simple interest is the norm, but that particular circumstances may justify the requirement to recover state aid advantages using compound interest. This sits oddly with the Regulation discussed above, which treats compound interest as the norm. It leaves it open to a beneficiary to challenge the requirement to repay the benefit obtained with compound interests when this would be unnecessary. The impact of the Regulation might be thus to reverse the burden of proof: originally it would have been for the Commission or the state to show the importance of claiming compound interest, now it would be for the beneficiary to show that simple interest would suffice to restore the status quo ante.

## Summary

45. Overall, the focus on State aid law is useful for two main reasons. First of all, because it shows the (EU law) purpose of applying compound interest – this is restoring a previously existing situation in the market. In effect, this is the restitutionary equivalent of full compensation. Secondly, it shows that there is an area of EU law in which there is a statutory basis for the award of compound interest, and while, as noted, the Regulation does not provide for complete codification, it shows the desirability of laying down precise rules on interest. This is also revealed in the case studies discussed in part 3 where member States with properly drafted rules have seen much less litigation to clarify the interest entitlement.

## Non-contractual liability of the Union

46. From the three areas of law discussed in this report, the non-contractual liability of the EU is probably closest to damages in competition law. The purpose of non-contractual liability is to compensate claimants for breaches of EU law committed by the Union. As such, the award of interest on damages is part of the compensation claimants should receive.
47. However, there are not that many non-contractual liability cases in which interest and the interest rate is discussed. The case of *Mulder*<sup>42</sup> provides some guidance on the principles which should cover the award of interest on damages claims. A number of Dutch farmers, who all produced milk, brought a damages claim against the EU after the CJEU had declared in a previous judgment that a Commission Regulation on milk quotas was invalid under EU law.<sup>43</sup> The CJEU confirmed the purpose of the reparation of the damage suffered as a result of

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<sup>41</sup> Case C-89/14 *A2A SpA v Agenzia delle Entrate*, ECLI:EU:C:2015:537 paragraph 42

<sup>42</sup> Case C-104/89, *Mulder and others v Council*, ECLI:EU:C:2000:38.

<sup>43</sup> Case C-120/89, *Mulder v Minister van Landbouw en Visserij*, ECLI:EU:C:1988:213.

breaches of EU law committed by the EU institutions. It held that “compensation for the loss suffered is intended so far as possible to provide restitution for the victim of the unlawful conduct of the Community institutions”.<sup>44</sup> Moreover, “in order to restore victims to the situation in which they would have found themselves if the harmful act had not been perpetrated, it is primarily the damage actually suffered which must be made good”.<sup>45</sup> In this case the damage was lost profits by virtue of the reduced milk output of the farmers that resulted from the illegal Union act.

48. In *Mulder*, the claimants claimed interest from the date that the damage arose. The CJEU confirmed that interest was applicable from the moment that the damage occurred. As such, this approach appears consistent with the approach taken by the CJEU in *Irimie*,<sup>46</sup> which is discussed below. Because of the specific facts of *Mulder*, in which the claims were brought by farmers who would not have invested any money they would have obtained but who would rather have used it for general subsistence, the CJEU applied a relatively low interest rate.<sup>47</sup> The farmers had claimed interest calculated on the basis of the interest rate applicable to State loans in the Netherlands at the time (around 8%). However, the Court only awarded interest corresponding to the inflation rate (1.85%). No interest was awarded for the unavailability of profits from milk production. This was because the claimants had not provided any evidence to show that they would have invested (a part of the) profits in a bank account.
49. The judgment shows that if claimants want to claim a higher amount of interest, they have to provide evidence that the money would have been invested. Furthermore, *Mulder* confirms that interest should be calculated from the moment that the damage occurred.
50. In the more recent case of *AFCon*,<sup>48</sup> an Irish company claimed compensation as a result of irregularities in a tendering procedure launched by the Commission. The substance of the case is not relevant for the purposes of this report. However, at the end of the judgment the General Court finds that “in their assessment of the harm they claim to have suffered, the applicants did not ask for compound interest. Therefore, in order to establish the amount of interest which the Commission is to pay, simple interest must be applied”.<sup>49</sup> As a result, it appears that compound interest has to be specifically asked for by the claimant. Moreover, it means that claimants have to present evidence to justify their claim for compound interest. If it has not specifically been claimed, simple interest is awarded. *AFCon* shows that the General Court does not award compound interest if it has not been claimed.
51. These cases tally with and support some of the observations above: interest is awarded from the date of the damage, and the appropriate rate of interest is for the parties to establish, and as the two cases show this may be revised upwards or downwards depending on the facts of the case. It is not clear from the case law if there is a ‘minimum’ rate of interest that must be applied. In *Mulder* the choice of the inflation rate was probably to adjust the compensation to the increased cost of living, since the intended expenses of the claimants was just on subsistence, for example. The position thus in claims against the Commission is that interest on damages is for the parties to plead and for the court to determine which rate of interest best serves to achieve the compensatory objective on the facts. It may also be suggested, based on this case that the minimum amount of interest should be that which corrects for inflation, so the court may have intended to set a floor below which interest may not be set.

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<sup>44</sup> *Mulder and others v Council*, above n 13, para 63.

<sup>45</sup> *Ibid.*

<sup>46</sup> Case C-565/11, *Irimie v Administrația Finanțelor Publice Sibiu*, ECLI:EU:C:2013:250.

<sup>47</sup> *Mulder and others v Council*, above n 13, paras 214-221.

<sup>48</sup> Case T-160/03, *AFCon Management Consultants and others v Commission*, ECLI:EU:T:2005:107.

<sup>49</sup> *AFCon Management*, above n 19, para 131.



## Recovery of unlawfully charged levies

52. The third area of law discussed in this report is the recovery of levies which have been charged by Member States in breach of EU law. Again, it should be noted that this is conceptually different from damages claims. The purpose of actions against Member States which have unlawfully charged certain levies is to reimburse the charges levied in breach of EU law and to pay interest in compensation for the unavailability of the sum paid. As such, while the action is restitutionary in nature, the aim of the award of interest is compensatory.
53. From the three areas discussed in this report, the unlawful levy cases provide the most detailed discussion about interest and interest rates. Three main cases will be discussed (in chronological order of the judgments): (i) *Littlewoods*,<sup>50</sup> (ii) *Zuckerfabrik Jülich*<sup>51</sup> and (iii) *Irimie*.<sup>52</sup> These cases have been selected because they provide the most detailed discussion of the award of interest and interest rates in this area and because they deal with the main issues which could be raised.
54. In *Littlewoods*, a UK-based home shopping business had paid too much VAT for a significant period of time. It was not in dispute between the parties that interest was payable on the amount which should be repaid to Littlewoods. However, one of the main questions which were referred to the CJEU was whether the interest should be calculated on a simple or compound basis.
55. In her Opinion, Advocate General (“AG”) Trstenjak argued that, as a matter of EU law, interest was recoverable.<sup>53</sup> There is an EU law right to payment of interest. However, whether the interest should be calculated on a compound or simple basis was a matter of for national law, which had to comply with the principles of effectiveness and equivalence. The relevant UK legislation only provided for simple interest. According to AG Trstenjak, this legislation clearly complied with the principle of effectiveness. She went as far as to argue that “a breach of the principle of effectiveness would therefore arise only if the interest were so low that it largely deprived the interest claim stemming from EU law of substance”.<sup>54</sup>
56. The CJEU’s approach was less explicit. In its judgment, it held that “it is for the internal legal order of each Member State to lay down the conditions in which such interest must be paid, particularly the rate of that interest and its method of calculation”.<sup>55</sup> A few paragraphs later, it held that the principle of effectiveness “requires that the national rules referring in particular to the calculation of interest which may be due should not lead to depriving the taxpayer of an adequate indemnity for the loss occasioned through the undue payment of VAT”.<sup>56</sup>
57. There is an important difference between the approach of the CJEU and that of its AG. While the AG takes a negative approach – the interest rate should not “largely deprive the interest claim of substance” – the CJEU takes a slightly more positive approach – the interest rate should “not deprive the claimant of an adequate indemnity”. It refers specifically to the concept of “adequate indemnity”, which could be considered as similar to the concept of “full compensation”. In any event, the specific wording of the CJEU’s judgment indicates that there might be situations in which compound interest is required to provide an adequate indemnity. A failure to award compound interest could, in certain circumstances, deprive a claimant of an adequate indemnity and, as a consequence, could be in breach of the principle of effectiveness.

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<sup>50</sup> Case C-591/10, *Littlewoods Retail and others*, ECLI:EU:C:2012:478.

<sup>51</sup> C-113/10, *Zuckerfabrik Jülich v Hauptzollamt Aachen*, ECLI:EU:C:2012:591.

<sup>52</sup> Case C-565/11, *Irimie v Administrația Finanțelor Publice Sibiu*, ECLI:EU:C:2013:250.

<sup>53</sup> Opinion of AG Trstenjak in *Littlewoods*, above n 21, para 30.

<sup>54</sup> Opinion of AG Trstenjak in *Littlewoods*, above n 21, para 34.

<sup>55</sup> *Littlewoods*, above n 21, para 27.

<sup>56</sup> *Littlewoods*, above n 21, para 29.

58. Interestingly, when the case returned to the English High Court, Mr Justice Henderson held that it was necessary to exercise his discretion to award compound interest. According to his judgment, “only compound interest will suffice to satisfy the claimants’ EU law right to interest”.<sup>57</sup> He held that “the claimants will only receive an adequate indemnity for their loss occasioned by the overpayments of VAT if they are paid, a sum which represents the use value of the overpayments in the hands of the Government”, although “the use value which EU law entitles them to receive is the lost use value to themselves of all sums overpaid”.<sup>58</sup> Therefore, compound interest was awarded.
59. In *Zuckerfabrik Jülich*, a German business challenged the validity of a Commission Regulation in the field of sugar production. The CJEU held that the regulation was invalid. One of the questions which had to be answered as a result of this finding was whether the claimants were entitled to interest on the levies which had been unlawfully charged. It held that “individuals entitled to reimbursement of sums paid unduly in respect of production levies in the sugar sector determined on the basis of an unlawful regulation are also entitled to payment of the interest on such sums”.<sup>59</sup> It concluded that “it is not permissible for a national court to use its discretion to refuse payment of interest on the sums charged by a Member State on the basis of an invalid regulation on the ground that the Member State could not reclaim the corresponding interest on the European Union’s resources”.<sup>60</sup>
60. Although the context of *Zuckerfabrik Jülich* is highly specific, it is a useful case to show that, as a matter of EU law, the award of interest is not discretionary. Interest is a fundamental and integral part of the recovery of unlawful charges and has to be awarded to provide adequate indemnity to the claimants. As a result, this confirms that national legislation cannot exclude the award of interest.
61. In the recent case of *Irimie*, a Romanian national challenged the Romanian legislation which provided that interest granted on the repayment of tax charges levied in breach of EU law only started to run from the date when the claim for repayment of the charges had been issued.
62. The CJEU confirmed that it was for Romanian law to lay down the precise conditions under which the interest had to be paid. It held that “national rules referring in particular to the calculation of interest which may be due should not lead to depriving the taxpayer of adequate compensation for the loss sustained through the undue payment of the tax”.<sup>61</sup> In this case, “a system such as that at issue in the main proceedings, which limits interest to that accruing from the day following the date of the claim for repayment of the tax unduly levied, does not meet that requirement”.<sup>62</sup> This was because the “loss depends, inter alia, on the duration of the unavailability of the sum unduly levied in breach of European Union law and thus occurs, in principle, during the period between the date of the undue payment of the tax at issue and the date of repayment thereof”.<sup>63</sup>
63. As such, *Irimie* is consistent with *Mulder* – interest is payable over the full period from the date the damage occurred. The award of interest is not linked to the moment when the claim is brought, but forms an integral part of the damages awarded to compensate claimants for their loss. Moreover, the CJEU has adopted the term “adequate compensation” instead of “adequately indemnity”. Although this could just be regarded as a linguistic clarification, since

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<sup>57</sup> *Littlewoods Retail and others v Her Majesty’s Revenue for Customs and Excise*, [2014] EWHC 868 (Ch), para 420.

<sup>58</sup> *Littlewoods Retail and others*, above n 28, para 348.

<sup>59</sup> *Zuckerfabrik Jülich*, above n 22, para 67.

<sup>60</sup> *Zuckerfabrik Jülich*, above n 22, para 68.

<sup>61</sup> *Irimie*, above n 23, para 26.

<sup>62</sup> *Irimie*, above n 23, para 27.

<sup>63</sup> *Irimie*, above n 23, para 28

the word “indemnity” often means protection for future losses, it certainly sounds more like the concept of “full compensation” introduced in competition law.

### *Emerging principles*

64. On the basis of the cases, it is possible to draw some conclusions as to the general principles which cover the award of interest on claims brought under EU law. However, two important reservations should be made. First of all, the number of cases which has really discussed the principles which govern the award of interest is low. The award of interest is often fact-specific and based on detailed calculations made by the parties. Most of this background is missing in the judgments of the CJEU and the General Court. Secondly, the cases which have been discussed in this report come from different areas of law. In these different areas of law the interest is awarded on different types of claims. However, since the aim of the award of interest is similar and EU law does not appear to take different approaches to the different areas, it is possible to draw more general conclusions. The CJEU has not made a rigid distinction between claims based on compensation or on restitution. The aim of the award of interest is to put the claimant in the situation he would have been in if the breach of EU law had not occurred or to restore the previously existing situation in the market.
65. There are three main conclusions which can be drawn from the case-law. First of all, EU law requires that interest is awarded when the claimant suffers a loss. It is an integral part of a claim for damages. This means that national legislation which provides that no interest can be awarded is necessarily in breach of EU law (*Zuckerfabrik Jülich*).
66. Secondly, the principle of effectiveness requires that interest can be claimed from the moment when the harm occurred (*Mulder, Irimie*). National legislation which provides that interest only accrues from the moment legal proceedings are started does not comply with the principle of effectiveness and, as a result, is in breach of EU law (*Irimie*).
67. Finally, EU law leaves it to the Member States to decide whether simple or compound interest is awarded on damages claims. And it affords judges the latitude to select an appropriate rate of interest to reflect the loss most accurately. However, national law has to comply with the principles of effectiveness and equivalence. With regard to equivalence, this means that Member States are not allowed to apply more advantageous interest rates to claims brought under national law. In addition, the effectiveness of EU law requires that Member States provide adequate compensation to claimants. This requires a case-by-case assessment. As such, Member State legislation which provides that interest is always to be calculated on a simple basis might be in breach of EU law. However, this is not a claim which can be made *in abstracto* – it has to be shown that the award of simple interest would not provide adequate compensation to the claimant.
68. It is difficult to identify in the case-law the kind of factors which should be taken into account in deciding whether simple interest provides adequate compensation. In *Mulder*, a higher interest rate was denied to the claimants because they could not show that they would have used the money for investment in a bank account – they would primarily have used it for subsistence. This would seem to suggest that the *use* which claimants would have made if they had had the money in their possession is of direct importance to determine the applicable interest rate. Moreover, as is shown by *Mulder*, it is important that claimants are able to provide precise *evidence* of what they would have done with the money. Furthermore, the *duration* of the breach of EU law should be taken into account. Although this has not been explicitly dealt with in the case law, for breaches of EU law committed over a significant period of time – particularly in commercial claims where there is a lot of money involved – there would be a very significant difference between the award of simple or compound interest.
69. While it is not possible to make a direct link, Article 11(2) of Commission Regulation 794/2004 shows that, in State aid law, the Commission requires it necessary to calculate

interest on a compound basis to adequately restore the previously existing situation in the market. This logic can also be applied to competition law claims. Although damages claims in competition law aim to compensate businesses for their losses suffered as a result of breaches of competition law, competition law is also concerned with the structure of the market. Furthermore, but for the breaches of competition law, victims of breaches of competition law would have had more money available which they could have invested or on which they could have made a profit. As a result, if evidence of how the money would have been invested can be provided, compound interest might be necessary to provide adequate compensation to claimants in competition law claims.

#### The impact of the ECHR and the Charter

70. Article 6(3) TEU provides that the rights guaranteed by the European Convention for the Protection of Human Rights (“ECHR”) shall constitute general principle of Union law.<sup>64</sup> As such, it might also be helpful to have a look at how the European Court of Human Rights (“ECtHR”) in Strasbourg approaches claims for interest and how it decides on the applicable interest rate. However, a search of the ECtHR’s case-law does not reveal any cases in which the principles which govern interest claims are discussed in any detail. This is probably the result of the fact that the ECtHR is normally concerned with providing “just satisfaction” to claimants. This is an ‘equitable’ approach which does not require adequate or full compensation. There were some cases in which the nature of the breach – usually of the right to property in Article 1 of Protocol of the ECHR – was such that the ECtHR held that full compensation – *restitutio in integrum* – had to be provided.<sup>65</sup> However, these cases are rare and there is no real discussion about the interest or interest rates in these cases.
71. The Charter might be more helpful for claimants in competition law claims. Article 47 of the Charter provides that “everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy”. This also applies to damages claims for breaches of competition law. It is clear that Article 47 has become one of the most popular provisions of the Charter and is frequently relied on by litigants before the CJEU and General Court.<sup>66</sup> Its precise interrelationship with the principles of effectiveness and equivalence remains uncertain. It would seem that the general principle of effectiveness is covered by Article 47, which means that a breach of the principle of effectiveness would also constitute a breach of Article 47 of the Charter. However, in *Alassini*,<sup>67</sup> the CJEU treated the principle of effectiveness separately from the question of whether the Italian legislation complied with the general principle of effective judicial protection laid down in Article 47.<sup>68</sup> In any event, it is clear that Article 47 could be relied on to support of the argument that the award of compound interest is necessary to provide full compensation to claimants in competition law claims. As a matter of EU law, the remedy provided would only be effective if full compensation, including compound interest, was awarded.

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<sup>64</sup> Recall that nothing prevents EU Law from affording a higher level of protection than that offered by the ECHR, see Article 52(3) of the Charter of Fundamental Rights.

<sup>65</sup> *Papamichalopoulos and Others v. Greece* (Article 50), judgment of 31 October 1995, Series A no. 330-B.

<sup>66</sup> See M. Safjan and D. Dürsterhaus, “A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU”, (2014) 33 Yearbook of European Law 3.

<sup>67</sup> C-317/08, *Alassini v Telecom Italia SpA*, ECLI:EU:C:2010:146.

<sup>68</sup> However, see the different approach taken by AG Kokott, Opinion in *Alassini*, above n 37.

## Conclusion

72. Throughout this report, it has been emphasised that there have not been many cases in which interest and the applicable interest rate were discussed by the CJEU or the General Court. It would be interesting to think about *why* this is the case, but a detailed analysis of that question is beyond the scope of this report. One explanation could be that EU law is content to provide a broad scope of discretion to national law and national courts. Another could be that litigants before the European courts often do not think of interest as a matter of EU law. Finally, there is also scant litigation on interest at national level, with the issue normally resolved extra-judicially even in damages claims that are litigated. In any event, the scarcity of case-law precludes us from drawing too many conclusions.
73. Three conclusions are uncontroversial. First, claimants who suffer loss have a right under EU law to be awarded interest on that harm. National legislation cannot exclude the award of interest on EU law claims. Second, interest should be calculated from the date the harm occurred. Third, the rate of interest should reflect the loss sustained, and parties should be entitled to plead for a given method of calculating interest. The third point above has been discussed almost exclusively with regard to considering whether claimants have a right to compound interest under EU law. The clearest answer that can be given is the claimants have a right to compound interest if this is necessary to provide them with adequate compensation for the breach of EU law. A number of factors are relevant here, such as the duration of the breach and the evidence that they can provide to substantiate the claim for compound interest, as well as the rate of interest. From this perspective, national legislation which completely excludes the possibility of compound interest being awarded runs a serious risk of being in breach of the principle of effectiveness of EU law.

## Part 3: Analysis of national legal systems

### General

74. In each of the national reports the same hypothetical factual scenario for a damages claim was considered, and the table below summarises the interest that each reporter computed.

Table 1: damages and interest drawn from the national reports

Jurisdiction	Damages	Interest	Total
Austria	400	106.03 (w contract)	506.03
	400	51.20 (w/o contract)	451.20
Belgium	691.36 (interest)	4.11	695.47
	709.19 (refinance)	4.23	713.41
Czech Republic	400	156.66 (default interest)	556.66
	453.59 (re-evaluated)	177.65	631.24
England and Wales	400	285.73	685.73
Finland	400	259.12	659.12
France	400	1.57 (from the date of judgment)	401.51
	400	173.33 (from date of loss)	573.33
Germany	400	235.18	635.18
Italy	527.43 (re-evaluated)	192.25	719.68
Netherlands	400	390.78	790.78

Portugal	512.06 (inflation) 584.28 (bank rate)	65.53 74.77	577.59 659.05
Slovakia	477.96 (re-evaluated)	137.89	615.89
Spain	594.53 (re-evaluated)	78.61	673.14
Sweden (using the most conservative estimate)	400	155.00	555.00

75. The table makes it immediately visible that there are two techniques used to calculate the damages and interest awards. In some systems the damages portion is calculated in such a way that in addition to the loss suffered at a given point in time, the loss resulting from the claimant not having the money at his/her disposal is calculated as part of the damages. In these legal systems, interest then begins to run from the time the claim is brought. In other legal systems instead, interest runs from the time that the loss is suffered. Some reports suggest various ways in which the damages portion may be calculated and the table sets some of these out.
76. The lesson from this snapshot is that it may be imprudent to make an assessment of a legal system's interest laws without taking into consideration the mechanism for assessing damages. At the same time, the table shows some notable variations across the jurisdictions, which raise doubts about the capacity of some legal systems to afford full compensation.
77. The least generous jurisdictions overall (Sweden) is so because according to the Swedish Interest Act interest does not run from the date of the loss. In France, even if we could count interest from the time of loss, the interest rate set is quite low, and as the national report indicates, there are concerns that claimants are not afforded full compensation. The Dutch system is by some distance the most generous because interest from the date of the harm is always compounded. However, it would be too rash to condemn a legal system simply on the basis of this table. It is best to focus on specific rules or practices in each Member State and to consider which of these results in under-compensation, and then test how far national law might be challenged as incompatible with EU Law. The general observation that one jurisdiction is less generous than others may be used to supplement a more specific argument about a particular aspect of the interest calculation regime, and it supports a case for harmonisation.
78. In the following sections we review each national report and test how far rules and practices may fail to conform with the standards set under EU Law, based on the benchmarks set out in parts 1 and 2 of this report.

#### Austria

79. A recent amendment means that for competition law infringements committed after 28 February 2013, interest is calculated from the date the wrong is done, and this amendment is specific to antitrust claims and is designed to bring Austrian law in compliance with EU Law.
80. Before the amendment interest ran from the time the claim was brought to the attention of the defendant. Any losses sustained earlier would be calculated by assessing the damages. It is also clear that in assessing the loss before the claim that the courts can have regard to the statutory interest rates to uncover the opportunity cost suffered by the claimant. If so one wonders if the amendment was truly necessary since the earlier system seemed to deliver full compensation even if it did not apply the same headings as those used by the CJEU in *Manfredi*.
81. An issue which will require clarification EU-wide is what the time of loss is. Some Austrian scholarship suggests that this time is when the contract is signed, and not the time payment is

made. This can have a significant impact in cases where the time difference between the contract and the payment is lengthy. There is some support for taking the time of the contract because usually a party wishing to rescind a contract would indemnify the other side, thus the claimant in an antitrust damages claim would be locked in to the contract at the time of signing and losses would arise from that time.

82. One issue that the reporter sets out is that if interest is claimed as damages there is a requirement that the defendant has acted at least with ‘slight negligence’. As matters stand it is not clear whether liability for breaches of Articles 101 and 102 is strict or based on negligence. If liability is found to be strict, it may mean that there could be some cases where the claimant may be under-compensated if he cannot show the degree of negligence required by Austrian law.<sup>69</sup>
83. Insofar as the pre 2013 law is concerned, payment of interest arises from the moment the claim is made, and it is classified as interest to be paid on delayed payment. The courts have no discretion to vary this amount of interest, even when it over-compensates the claimant. The rationale seems to be that interest for delayed payment has a punitive role. On the basis of the guidelines from the CJEU there is some risk that this approach may be challenged for enriching the claimant unnecessarily. However, this would have to be weighed against the policy of encouraging prompt payment that is afforded by this strict rule, and in this case the over-compensatory effect would likely be justified.
84. With reference to the law governing interest claims from 2002, the rate of interest is higher for ‘commercial transactions’. According to the reporter it means that if the claimant buys directly from a cartel member (call him D1) then the interest calculated on damages sought from D1 is at a higher rate because of the contractual nexus between the parties. In cartel cases there will be multiple defendants who are jointly and severally liable. Suppose D2 is a cartel member who has never made any sales to the claimant. In this case, D2’s liability to the claimant is based on a lower interest calculation because the two have not engaged in commercial transactions. This stems from the case law of the Austrian Supreme Court which has established that late payment has a subjective effect and is not part of the joint liability of the other wrongdoers. From the perspective of full compensation this is problematic when the lower interest fails to afford full compensation. Of course the claimant will be well advised to sue D1 for the entirety of the loss, and leave D1 to seek a contribution from D2, thereby avoiding the risk of under-compensation. However there will be occasions when D1 is insolvent and the claimant will seek damages from D2. In this scenario the Austrian rule would fall foul of EU law.
85. It is not particularly clear how the joint and several liability issue will be addressed under the new law of 2013. Insofar as the claim is brought for losses sustained after 1 March 2013 it would appear that interest will run from the date of the loss until the date of payment, so that all defendants (whether those selling directly to the claimant and the others party to the cartel) will be jointly liable for the damages and the interest. However, it remains possible that different rates of interest would need to be applied to two jointly liable cartelists.<sup>70</sup> And this would remain problematic under EU law when the claimant is forced to seek compensation only from the defendant who is liable under the lower rate of interest (e.g. in case of other defendants’ insolvency).

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<sup>69</sup> For cartels this is not a real problem as it seems impossible that cartel members are not at least slightly negligent. For other kinds of competition law infringements, where the case law is rapidly evolving, this may be different (e.g. in cases of standard essential patents).

<sup>70</sup> See paragraph AT.28 for this difficulty

## Belgium

86. Belgium distinguishes between compensatory interests and ‘moratory’ interests. Compensatory interest is due on debts of value. Debts arising from contractual or non-contractual liability are debts of value until their amount has been determined by the court or by agreement between the parties. Moratory or late payment interest is due on monetary debts, i.e. debts consisting of an obligation to pay a specific amount of money. In the case of contractual liability other than to pay a price, or in cases of non-contractual liability moratory or late payment interest is due as of the moment the amount of the debt is determined by the court or by agreement between the parties.
87. Interest on debts of value arising from contractual liability arises as of the notification of default. Claims for antitrust damages will, however, often be non-contractual. With regard to compensatory damages arising out of non-contractual liability there is some uncertainty as to the moment this starts, with the Supreme Court stating that it is at the discretion of the court. However, there is also case law which recognises that time should run from the moment the damage is suffered (see paragraph BE 24 of the report for discussion of the case law). From the perspective of EU law, interest should run from the moment the damage is suffered.
88. Belgian law provides for several ways through which the claimant may lose the right to compensatory interest, for instance if the claimant is responsible for the late payment or if the claimant is guilty of an abuse of law. Judged under EU law standards, these provisions that allow for the adjustment of interest calculation downwards are probably acceptable insofar as they are consistent with the principle that the claimant should not be enriched unjustly. They also serve to ensure that the claimant receives full compensation.
89. The interest rate for compensatory damages is at the discretion of the court (paragraph BE 19 of the report), if the court does not determine what interest rate is to be fixed, the legal interest rate applies (which is usually the rate for moratory interest). The parties are free to make a claim for a specific rate of interest which they believe best reflects their loss.
90. When it comes to moratory interest it appears that the parties may agree to a figure different from that provided for by the legal interest rate but that the courts will ensure that this sum is not excessive having regard to the actual loss of the defendant. . It is to be noted however, that agreements on moratory interest are usually part of contracts which provide for the payment of a certain price. Non-payment of a contract price will only rarely be an infringement of competition law.
91. Art. 1154 Civil code restricts compound interest in cases of debts of money. There is no restriction on compound interest on debts of value. However, it appears that even in cases of debts of value compound interest is rarely claimed or awarded outside the boundaries of Article 1154 Civil code (even although it does not apply) as with many other jurisdictions this approach may be challenged as unduly restrictive when denying compound interest under-compensates the claimant.
92. Courts are willing to fill in gaps in incomplete pleas, for instance when claimants fail to indicate the interest rate the court may set this using the legal interest rate (paragraph BE 43 of the report). The active manner by which Belgian courts assist claimants is unusual compared with other Member States that have been surveyed.
93. The report notes (paragraph BE 56) that there is a risk of inconsistency with EU Law in cases where the claim is linked to contractual non-performance because then interest would run from the notification of breach, and not from the time the loss is sustained. However as the report notes it is possible to re-evaluate the loss to account for lost profits, in which case this would serve to ensure full compensation even if interest only runs from the date of notification.
94. The report closes by noting that given difficulties of proof the legal interest rate may tend to be the one used for both compensatory and moratory interest claims. Insofar as claimants in



competition law are more successful in providing a better estimate of loss than the Belgian system will afford full compensation.

#### Czech Republic

95. Interest runs from the time the claim is brought but any economic loss stemming from the unavailability of money (e.g. due to overpayment as a result of an inflated price) may be claimed as damages.
96. The report distinguishes two times from which interest accrues, depending on the action of the claimant: if the claimant makes a pre-trial request for damages to the defendant then interest begins to run from that time. Otherwise, if the claim is brought to the court then the time runs from when the court summons the defendant. It is likely the former will normally apply, not least for the incentives that claimants have to notify the defendant of the claim against them quickly
97. The legal system recognises that default interest may be compound from the day that the lawsuit for damages is brought, and this looks like it could be awarded in competition cases. However this is only applicable from 1 January 2014 when the new civil code came into force. For claims based on an infringement of EU Law this may not suffice to afford full compensation.
98. The rates set for default interest include a punitive element, which is also designed to incentivise prompt payment. This policy is not inconsistent with EU Law: one might question if this leads to over-compensation for claimants, but the response that this ‘gift’ to the claimant serves to secure prompt payment more generally would likely survive judicial scrutiny at the CJEU.
99. The reporter notes that while the loss of interest that accrues before a lawsuit is launched is not included in the interest calculation and that the claimant can claim this sum as damages, it is not clear how the courts will quantify this loss and how far they will rely on the claimant’s own calculations.
100. In sum, the compatibility of Czech law with the EU principles depends very much on how the courts entertain the damages claim – if they are willing to recognise the opportunity cost of not having money as damages, then the interest regime suffices, but if courts prove unwilling to calculate damages as indicated by the report, then the award of default interest might not suffice, even if the interest rates set are quite high.

#### England and Wales

101. There is little to quibble with when it comes to this jurisdiction, which should not be surprising as the common law has historically evolved to facilitate suits being brought in this jurisdiction. The *Sempra Metals* judgment discussed in that report may be read in this key.<sup>71</sup> It also means that national courts will be amenable to policy arguments based on ensuring effective compensation, more so than some other jurisdictions with more formalistic legal architectures. Since the Competition Appeals Tribunal will eventually be the principal forum for all competition law damages claims,<sup>72</sup> its discretionary power to award compound interest puts the national law in line with the EU standards on this point.

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<sup>71</sup> *Sempra Metals v Inland Revenue Commissioners* [2008] AC 561

<sup>72</sup> However, at the time of writing there are some transitional difficulties arising out of the new rules emanating from the Competition Appeal Tribunal Rules 2015 and it seems some cases may remain in the High Court. That said, in one case it was decided anyway to move the case to the CAT, see *Sainsbury Supermarkets Ltd v MasterCard Incorporated* [2015] EWHC 3472 (Ch)

102. However, parties might be inclined to press courts more on their reasoning. For instance in *2 Travel*,<sup>73</sup> the Tribunal utilised a relative low rate of interest, and it would appear that this would have to be motivated better, in particular with respect to ensuring that like claims are treated alike (equivalence in EU Law terms). In this context, comparisons with other kinds of damages claims may be relevant: it appears that in commercial cases the courts tend to opt for lower rates, but the courts appear reticent to explain why this lower rate suffices to afford just satisfaction of the claim. Absent an account of why a given rate is selected a judgment might be challenged for failing to afford full compensation. In other words, the absolute discretion to award interest may risk being inconsistent with EU standards. This would be ameliorated by an explicit account of how the judge exercises his/her discretion.
103. Another issue that might be challenged as contrary to EU Law (as noted by the reporter at para UK 37) is that the courts appear to refuse to look to the cost of borrowing of the specific claimant. While they will consider differences between small business claimants and claimants who operate a larger enterprise (and take the view that the latter may borrow at lower rates of interest), this might be said to go against the notion of full compensation; it may also unjustly enrich some claimants, and go against the case-by-case approach which the CJEU has favoured in a number of issues pertaining to damages claims in antitrust litigation, as we show in part 1.

#### Finland

104. The notion of ‘profit interest’ is somewhat problematic. Its motivation is laudable: it seeks to strip the defendant of unlawful gains, and thus it appears necessary in some cases to ensure full compensation. However the reporter notes that its availability is unclear and the case law evolving. At the same time, the leading competition damages claim so far (the *Asphalt cartel case*, discussed in section 4.1 of the report) has allowed profit interest and the issue for future litigation is whether there were specific features of this case that allow a plea that such interest is not awarded in all cases. On the facts it seems that when the claim is for the overcharge paid as a result of the cartel prices, then profit interests will be applicable. The rate selected by the courts depends on the pleadings of the parties and may even be quite high. This kind of interest would appear to be necessary to afford full compensation and national courts would have to develop subsequent case law to ensure that the claimant’s rights are safeguarded.
105. The apparent absence of an option to award compound interest (which is distinct from profit interest) would seem problematic in light of the discussion in part 2 above, which suggests that, if necessary to afford full compensation, compound interest should be awarded.
106. At the time of writing it appears that the Finnish legislature is considering how to implement the Damages Directive and an option under consideration is to award only ‘basic interest’ from the time the damage is suffered until the time when interest for late payment accrues. The interest would be set at 0.5%. This *lex specialis* would eliminate the availability of ‘profit interests’. This move would risk under-compensating the claimant and be contrary to EU Law, both by setting a very low interest rate compared to that of other jurisdictions, and by not allowing deserving claimants to seek a higher rate of interest.<sup>74</sup>
107. Nothing of course stops the Finnish courts from accepting claims for damages that include the cost to the claimant of not having the money at its disposal. If the damages calculation is carried out in this manner, the risk of under-compensation that results from the planned interest rules would be mitigated.

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<sup>73</sup> *2 Travel Group Plc (in liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19

<sup>74</sup> I am grateful to Katri Havu and Vasil Savov for this update.

## France

108. The French legal system presents us with a major problem because the report suggests that the usual starting date for the calculation of interest is when the damages payment becomes due, which in a tort case is the date of the judgment. However, it remains possible for the courts to determine that interest begins to run from an earlier time, including the moment the wrongful act was committed (see paragraph FR 14 of the report). Normally this issue is left to the courts specialising in the enforcement of judgments (juge de l'exécution), so the precise approach that has been taken is not easy to see from the reported cases.
109. Interest is simple, and can never be compounded, except for interest for late payment. This is problematic from the perspective of EU Law because it risks denying full compensation: as noted above courts must have the flexibility to opt for a higher rate of interest to afford full compensation.
110. The reporter notes that while the issue of interest calculation has received little attention, the view of some scholars is that the approach in France risks under-compensating claimants (see paragraph FR 21 of the report).
111. France is perhaps one jurisdiction where the rate of interest might be challenged as being too low, in particular in light of the most recent amendment: Government regulation (ordonnance) No. 2014-947 of 20th August 2014. Here, (see paragraph FR.25 of the report) where the claimant is a professional the rate for the 1<sup>st</sup> semester of 2015 is 0.93% (while it is 4.06% when the claimant is a non-professional). It is not clear why there is a lower rate for business claimants. The rationale in England and Wales is that business claimants can normally obtain a loan at a lower rate.
112. A potentially important judgment was rendered by the Paris Court of Appeal in *SNC Doux Aliments Bretagne v Ajinomoto* (paragraph FR 47 of the report). The claim was for overcharges and the court assessed the damages as the overcharge plus the loss arising from the claimant not having access to those funds (*lucrum cessans*) and thus avoided the application of the provisions on interest. While the reporter is critical, and the reasoning of the court is not clear on this point, we can see from other legal systems that this is an alternative manner of affording compensation which is the functional equivalent of assessing interest from the date of the loss. In the French context, this approach would serve to avoid the risk of national interest rules being declared incompatible with EU Law. Obviously this judgment does not create a binding precedent, and the mere fact that it is possible for judges to make a legal system compatible with EU law standards is not sufficient unless it is clear that this is the approach that is binding on courts.

## Germany

113. German Law appears to prohibit the award of compound interest (see paragraph DE 7 of the report). As noted above, this absolute bar seems to run counter to the way the CJEU has read the notion of effective protection, and runs against the approach taken in other branches of EU Law: the option to claim compound interest, when this is necessary to afford the claimant full compensation, cannot be denied.
114. At paragraph DE.8 the reporter also notes a difference of opinion when it comes to the rate of interest for claims arising before 1 July 2005. This debate should be addressed, insofar as the claim is brought on the basis of EU Law, by reference to the notion full compensation and effectiveness.
115. A higher interest rate is sometimes available (see paragraphs DE18-20); examples provided were systematic late payments or the extraction of very low prices both by powerful buyers. If one follows the guidance from the EU Law principles, the question to be considered is whether the court has the power to determine the rate of interest and whether it can take into account all

relevant circumstances to determine what rate of interest is most apt to compensate the claimant for its losses. Insofar as the legal system allows the option to consider the higher rate, then it is in line with EU Law. A blanket prohibition to seek the higher rate would run against the approach the CJEU has tended to disfavour when assessing national rules on damages claims.

#### Italy

116. At paragraph IT 17 the reporter notes that a claimant is able to argue that he/she should be entitled to an interest rate higher than the one stipulated. This is in line with EU Law, because it allows the claimant to produce evidence that the higher rate is more adequate in the circumstances. The choice of such a rate could of course be the subject of challenge.
117. The reporter notes some divergence in the interest approach in a set of similar cases arising from the car insurance cartel (paragraph IT.35). The resulting uncertainty could be challenged in two ways. First, one might state that the uncertainty prevailing in the legal system discourages claims and so the Italian legal system fails to afford appropriate routes for claimants to assert the rights. Second, one could challenge the specific approach in each individual case where the application of the interest rules seems to deny the claimant effective compensation. For instance, in some cases reported the interest was not re-evaluated annually. In other cases discussed in the report, some courts awarded damages only from the date of the award, and not from the date the loss was sustained. These kinds of inconsistencies do not appear to be systemic. That is to say, the general principles in the legislation and in the judgment of the higher appellate courts are rather clear but it is the application in discrete cases that yields these divergences. In order for the Italian legal system to afford the claimant with effective compensation, lower courts need to apply the pertinent principles consistently. The general point one may make looking forward is that in this jurisdiction the courts should be encouraged to focus on the question of how to afford effective redress rather than on domestic legal niceties. But none of the cases identified raises issues that could usefully be solved by the CJEU.

#### The Netherlands

118. The Dutch provisions for interest payment were revised relatively recently with the introduction of a new civil code in 1992. As such, they are straightforward and easy to apply. An issue that courts have to engage in is the starting time for the assessment of interest. It is agreed that the principle is that the time starts when the claimant sustains the loss, but the specific timing is a matter for discussion. The reason this becomes relevant is related to the way the court decides to calculate damages. As stated in the report the court may either quantify the damage precisely or abstractly. When the damage is quantified abstractly, legal interests will be come due at the time the damage is deemed to have occurred. When the damage is quantified concretely, legal interest only becomes due as of the moment the claimant actually incurred costs, for example by making payments to repair the damage caused. In antitrust damages claims, it is not likely that this will make much of a difference. For example, in the case of overcharges paid as a result of cartel prices, both methods seem to lead to the debt becoming due at the moment of the payment of the overcharge. The timing will probably become more problematic if the claim is for lost profits. Suppose that the claimant is a buyer of cartelised goods who would use these goods to manufacture something else to sell on. If the claimant claims damages based on lost profits on the basis that he bought less of the cartel goods and so made fewer sales, the time of the hypothetical sale of the goods the claimant did not manufacture and sell as a result of the higher price would have to be worked out by the

court in the abstract. The court could take the view that the loss arises when the goods are bought or at a later time when it could be assumed the goods would be sold.<sup>75</sup>

119. The issue has been litigated in an antitrust damages action where the precise dates when the claimant made payments were disputed (the *Tennet* case discussed at paragraph NL.34 of the national report). It is a useful case for it shows that in cases pertaining to long running cartels the precise records of payment may no longer be available. Here the court decided to base its calculation of interest on the basis that payment was made 14 days after the goods were received by the claimant. This reasonable approach is consistent with the way many jurisdictions resolve evidentiary issues of this kind.
120. It is worth noting that the interest is always compounded. This is on the basis that the reason for awarding interest is to give the claimant money he would otherwise have had and invested. It might be that this creates a risk that certain claimants are over-compensated so that on the basis of the approach taken by the CJEU courts should have the flexibility to vary the interest rate downwards to avoid unjust enrichment.
121. The main concern with the Dutch scheme is that while the interest rate may be reduced in certain well defined circumstances (for example the Civil Code provides that this is so when the full award of damages would lead to obviously unacceptable results) the courts may not increase the rate above that which has been fixed. This has been criticised by some scholars who believe that if one were to remain true to the aim of affording full compensation then it should be possible to award interest at a higher rate. The legislator's intention in not allowing higher rates was to keep procedures simple, knowing full well that this could lead to some under-compensation. On the basis of our assessment of the CJEU's case law this kind of bright line rule is something the Luxembourg court looks upon with disfavour, preferring a case-by-case approach. The better view would be to start from the premise that the legal interest rate is the minimum standard, which may be increased or decreased when it is shown that this is inadequate. It might thus be that this aspect of the Dutch system is not in line with EU law as understood by the CJEU.

#### Portugal

122. In Portugal there seems to be a gap between what interest parties are entitled to under the law and the approach of legal advisors who often appear to make an application for interest that is less generous than might otherwise be argued. It is not clear why this may be the case.
123. The time at which interest begins to be calculated is said to be the time of the lawsuit being brought. In the report this is known as 'delay interest'. *Prima facie* this is incompatible with EU Law. However, the reporter also notes that in certain instances the courts will consider as damages the unavailability of money by the claimant (compensatory interest, at paragraph PT 16). It means that *de facto* interest is calculated from the date of the loss, but that part of that interest is awarded as damages. If this is so, then the starting date set is not inconsistent with EU law. This will be so in particular if in calculating the losses from the moment of the breach the courts refer to the interest tables as a guide to estimate the losses sustained by the claimant in cartel overcharge claims. One might however suggest that courts are not being consistent, and this may explain why some legal advisors systematically fail to request interest from the date of harm. This inconsistency may discourage the proper application of the law.
124. Compound interest is unavailable. This appears incompatible with EU law, subject to the same proviso as above: if the interest calculation is subsumed into the damages award then judges will be able to calculate the loss accurately and the claimant will be fully compensated anyway, at least for losses incurred before the damages claim is brought. The absence of compound

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<sup>75</sup> See paragraph NL 8 of the Dutch Report

interest for the period subsequent to the act being launched remains problematic under EU Law on the basis that a claimant is entitled to claim compound interest if this is necessary to secure full compensation. Of course this could be remedied by an accurate calculation of the damage, as discussed in paragraph 124 above.

125. The rates of interest differ as between B2B and B2C transactions. It is not particularly clear if this is in itself contrary to EU Law. It may be argued that the higher rates in B2B cases reflect the likelihood that businesses as a whole would invest money more profitably and thus suffer a greater loss if money is not available to them. (It is pertinent to contrast the approach in France and in England and Wales where business claimants are considered able to obtain a lower rate of interest. In England and Wales this is explained by the ability of the business to secure a loan on more favourable terms.) However, as noted in the general report on EU Law, the CJEU is reluctant to accept bright line approaches like this and prefer that courts calculate the actual loss.
126. In sum, it appears that provided courts assess the opportunity costs suffered by the claimant as a result of the unavailability of money from the time payment is made, then the claimant obtains full compensation. The report notes that the main risk of one not being compensated fully depends either on the strategy of the legal advisor or the approach that the court will take – in this respect there is not a systematic incompatibility between the Portuguese approach and EU Law.

#### **Slovakia**

127. The Slovak system appears to recognise only late payment interest, and the national legislation is designed to implement the EU's late payment directive.
128. The date on which late payment interest begins to run may be the date from which the claim has been brought (paragraph 20 of the national report). This clearly fails to provide for full compensation. This position may be ameliorated if the claimant seeks damages based on overcharge (*dannum emergens*) and lost profits from not having the extra money available for other uses (*lucrum cessans*). As the report shows, this sum can be the functional equivalent of interest payment.
129. It appears from the report (although it is not specified) that judges will normally award a sum to cover the *lucrum cessans*, even if the method they would likely adopt to calculate this amount may vary from case to case. It does not appear from the report that different methods would yield significantly divergent results.
130. Interest is simple and there is no option for a judge to award compound interest (paragraph 19 of the national report). This is out of line with EU Law when it is shown that compound interest is necessary to afford full compensation.
131. The report makes no mention of any discretion for courts to reduce or increase interest payments if this proves necessary to avoid over-compensation or under-compensation. Insofar as no such discretion exists, this would run counter to the CJEU's position, on the basis that if judges are unable to vary interest they will not be able to afford full compensation all the time. EU law requires that judges have the power to modify interest rates to afford full compensation.

#### **Spain**

132. According to the Spanish report (paragraphs ES 6 to 9 of the report), three different periods should be distinguished for the purposes of interest calculation: (i) from the date of the harm to the date of the claim; (ii) from the date of the claim to the date of the judgment at first instance; (iii) from the date of judgment until payment is made.

133. Interest is generally simple, but it should be noted that the sum on which interest is claimed in period (ii) is the sum that includes the interest calculation in period (i). This was confirmed in an antitrust judgment discussed by the reporter (*Sugar Cartel* case discussed in paragraph ES 52). In other words for period (i) the interest calculation is used to estimate the loss (*lucrum cessans*). Henceforth therefore it is more accurate to refer to period (i) as ‘damages’ rather than as interest.
134. The practice of the court in antitrust cases shows some variation in the way damages in period (i) are calculated. In the *Sugar Cartel* this was the legal interest, in a case against Endesa (paragraph ES 42 of the report) the monthly consumer price index was used as the basis for calculating the loss in period (i), in the Property Insurance Cartel (paragraph ES 52) the average rate of the State Treasury Bonds was used instead of the legal interest rate). Further explanation is needed to explain whether the approach taken is fully reflective of the loss of the claimant and how far the court ensures that the measures proposed by the parties are adequate. Absent effective judicial oversight one risks over or under compensating the claimant, both results would be at odds with EU Law.
135. Whether the approach in the cases discussed above will remain may be questioned by the approach of the Madrid commercial court in *Estacio de Servei Cornella v Cepsa* where by reference to the Competition Damages Directive (then in draft) the court held that interest should run from the date of the harm being caused (paragraph ES 52). As indicated, whether this approach is followed or whether courts continue to reassess damages the result is roughly equivalent.
136. Compound interest may be awarded, provided parties request this in their writ, but the report states that this is not so in competition law cases. This may be problematic in cases where the award of compound interest is necessary to afford full compensation.
137. The interest rate is fixed yearly, but there is an option to revise the interest rate if this is required given economic circumstances. This flexibility allows for a more accurate estimate of the loss suffered by the claimant. Other Member States may well be challenged for not updating their interest rates in this manner, but the risk of this kind of challenge would appear to be remote in that it is not a general practice among Member States.

#### Sweden

138. The sole, but significant concern with the Swedish legal system is that interest on damages does not run from the date that the damage is suffered, but from 30 days after the claim for damages is made. This is out of line with most the other Member States surveyed, and with the general principle that the EU courts have elicited. Therefore, there is a *prima facie* case of incompatibility with EU law if this rule is applied to a damages action for breach of competition law. It is perhaps striking that this issue has not surfaced before in other contexts, for instance in cases of discrimination claims based on EU law, although probably here the time lapse is such that interest does not make much of a difference.
139. Having said that, the reporter notes that applying penalty interest from the time the loss is suffered would lead to a very high interest: instead of 155 units, the calculation shows that interest would amount to 298 units. The reporter (paragraph 23) notes that Swedish courts have some options to tinker with national rules to achieve results in line with EU Law (for instance by reference to restitution cases),<sup>76</sup> but that it may also be necessary for the Swedish court to request a preliminary ruling from the CJEU. In our view, based on the principles identified in

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<sup>76</sup> Another alternative might be to classify an antitrust infringement as an intentional crime, for which under section 4(5) of the Swedish Interest Act interest would start to accrue from the date of harm, but it is not clear if any antitrust infringement could be treated as a criminal offence.

parts 1 and 2 above, it looks difficult to sustain the Swedish rule, absent some adjustment by courts or legislator. At the time of writing the Swedish government, in proposing legislation to implement the Damages Directive has suggested that interest on competition damages should accrue from the time when the loss is suffered at the rate applicable for lost earnings, and then at the rate applicable for delayed payments from 30 days after the claim for damages is made.<sup>77</sup> This would appear to render the Swedish system compliant with EU law.

140. An issue that might be explored if the legislative amendment is unsuccessful would be to consider whether the Swedish courts are open to re-assess the loss sustained on the basis that the claimant not having a certain sum at its disposal for several years is entitled to damages calculated on the unavailability of money, like in the Belgian or Slovak system for instance. An alternative, as noted in the Swedish report, would be to modify the claim and seek compensation based on restitution by reason of termination or nullity of a contract under section 2 of the Interest Act.
141. The reporter notes that compound interest is available if agreed upon, and courts have no power to award this otherwise, as compound interest is an alien concept in Sweden. It is arguable that if compound interest is only available when the parties agree to it, that then this runs counter to EU Law, on two grounds: first insufficient judicial supervision, second effective protection requires that in appropriate cases compound interest is available as an option. The tenor of the Swedish report suggests that courts generally exercise sufficient oversight on other aspects of the interest claim, so on this point the procedures seem unusual.

## Conclusion

On the basis of the case study and the national reports, the Swedish and the French system present the greatest concerns: for both it is not clear if interest may run from the date of the loss; the French legal system also applies a very low rate of interest when compared to other jurisdictions. The situation in France is ameliorated if the damages award includes an assessment of the claimant's loss stemming from not having funds available to him. At the same time, we find that in most legal systems there are some questions which may be raised as to whether national law complies fully with EU Law. Some wider issues that cut across the national reports are noted here:

- In some jurisdictions we see inconsistent approaches by the judiciary in the way interest or damages are calculated. These inconsistencies raise issues of EU law in two respects. First the overall inconsistency found in any one legal system may discourage claims and so the legal system as a whole could be said to undermine the protection of EU law rights.<sup>78</sup> This could be ameliorated with deeper investments in judicial training. Second, for each individual case, EU law would appear to require that judges have an obligation to explain their conclusions more fully to ensure that the approach selected affords full compensation and treats like cases alike. However it may be hard to see how this recommendation can be implemented in some jurisdictions, short of asking some judges to revise the style in which judgments are rendered.<sup>79</sup>

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<sup>77</sup> Bill Ds 2015:50. I am grateful to Magnus Strand for this information

<sup>78</sup> The remedy against this, however, would be for the Commission to institute infringement procedures against the Member State for these systemic failures. The basis for this would be Article 258 TFEU. It is beyond the scope of this report to explore this avenue. For an overall assessment, see D. Chalmers, G. Davies and G. Monti *European Union Law: Text and Materials* (3<sup>rd</sup> ed Cambridge University Press, 2014) ch.8

<sup>79</sup> This point was made in a different context in a study of the application of the rules of free movement of goods where the author noted that some national courts do not provide sufficient reasons for their conclusions. The study suggested that while this might be due to the very economical judicial styles of some (e.g. France) EU law requires a full statement of reasons for certain conclusions (e.g. whether a restriction of free movement is justified). M. Jarvis, *The Application of EC Law by National Courts: The Free Movement of Goods* (Oxford University Press, 1998) p.441.



- For most jurisdictions where interest starts to run from the time of the claim (and any earlier start date appears impossible), the claimant's losses are re-calculated to reflect the unavailability of resources and this serves to achieve full compensation. In this regard, the amendments by the Austrian legislator appear unnecessary to ensure compliance with EU Law.
- One point that emerges from the EU case law is that a judge should be free to revise the interest award up or down depending on the specific circumstances so as to ensure the claimant is afforded full compensation – not all legal systems achieve this to the same extent. Perhaps an appropriate rule of thumb might be that the standard interest rate is adopted as the usual baseline to ensure full compensation, but in individual cases judges should have the power to raise or lower the interest rate figure to ensure that this compensates the claimant fully and does not enrich him or her unjustly, unless this enrichment is justified by the policy of encouraging prompt payment.
- Moreover, for the same reasons as noted above, the outright ban on compound interest in a number of jurisdictions may well prevent the achievement of full compensation.<sup>80</sup>
- This report is based on the premise that national courts are now willing partners in the decentralised enforcement of EU Law. Accordingly courts should be willing to hear argument that national rules may not be consistent with EU Law and either modify their approaches or seek the view of the CJEU. At the same time it may be that the divergences we have noted among these jurisdictions suggest that this is a field ripe for law reform at EU level and that incremental adjustment by national courts would be insufficient. In this light, in transposing the Damages Directive Member States should be watchful and ensure that the rules put into place afford full compensation, and to revise existing rules when these would risk frustrating this policy objective.

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<sup>80</sup> See the short paper by R. Bowles and C.J. Whelan 'Judgment Awards and Simple Interest Rates' (1981) 1 International Review of Law and Economics 111, for instance noting that pre-judgment interest should be compounded.

## Austria

Viktoria H.S.E. Robertson<sup>81</sup>

### *Preliminary Matters*

- (AU.1) Parties upon which harm has been inflicted due to an infringement of EU or Austrian competition law can claim damages from the infringer(s) based on § 37a KartG (Austrian Cartel Act 2005)<sup>82</sup> and §§ 1293, 1311 ABGB (Austrian Civil Code)<sup>83,84</sup> For competition law infringements committed after 28 February 2013, parties can also claim default interest (Verzugszinsen) relating to these damages from the moment in which the harm occurred under § 37a para 1 KartG. The law foresees statutory interest rates in this respect: 4% per annum (pa) under § 1000 para 1 ABGB and, under certain circumstances, 9.2% above the applicable base rate under § 456 UGB (Austrian Commercial Code)<sup>85</sup>. For competition law infringements committed before 1 March 2013, parties could claim interest from the moment in which the harm occurred as positive damages (§ 1293 ABGB), provided the debtor has acted at least slightly negligently.
- (AU.2) Many of Austria's legal provisions regarding default interest have been substantially amended in order to implement the European Union Directives on combating late payment in commercial transactions.<sup>86</sup> Moreover, a specific provision on damages (and interest) for competition law infringements – § 37a KartG – was enacted in 2013 against the background of the European Union case law on damages for competition law infringements and the ensuing German reform.
- (AU.3) The Austrian rules relating to the interest for damages due to competition law infringements do **not differentiate** between the infringement of EU or national Austrian competition law.
- (AU.4) Although § 37a KartG provides specific rules for damages (and interest) for competition law infringements, such damages with interest underlie the general civil law regime and damages actions must therefore be brought in the **civil courts**.<sup>87</sup> Only where all concerned are business parties the **commercial courts** might have jurisdiction. Under Austrian civil procedure law, the litigation value is calculated without taking into account the interest claimed, where the

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<sup>82</sup> Kartellgesetz 2005 (KartG; Austrian Cartel Act 2005), BGBl I 61/2005, last amended by BGBl I 13/2013.

<sup>83</sup> Allgemeines bürgerliches Gesetzbuch (ABGB; Austrian Civil Code), JGS 946/1811, last amended by BGBl I 87/2015.

<sup>84</sup> Another possibility would be to base a damages claim on breach of law under § 1 Bundesgesetz gegen den unlauteren Wettbewerb (UWG; Austrian Unfair Competition Act), BGBl 448/1984, last amended by BGBl I 49/2015.

<sup>85</sup> Unternehmensgesetzbuch (UGB; Austrian Commercial Code), dRGBI 219/1897, last amended by BGBl I 22/2015.

<sup>86</sup> Directive 2000/35/EC on combating late payment in commercial transactions, OJ L 2000/200, 35; Directive 2011/7/EU on combating late payments in commercial transactions, OJ L 2011/48, 1; Aichberger-Beig in Kletečka/Schauer (eds), *ABGB-ON*<sup>1.01</sup> § 1000 ABGB (1 June 2014, rdb.at) para 1.

<sup>87</sup> This was emphasized by the explanatory notes accompanying the law that enacted § 37a KartG; see ErläutRV 1804 BlgNR 24. GP 11 (the provision does not lead to the jurisdiction of the Cartel Court). The Cartel Court itself has also emphasized that general civil courts have jurisdiction over damages claims for competition law infringements, see Cartel Court, case 25 Kt 19/08.

interest is only an accessory claim.<sup>88</sup> The amount of the litigation value is decisive for the question of which court is competent.<sup>89</sup> However, interest may also be requested as a principal claim.<sup>90</sup>

## **Section I. General Principles**

### **1.1. What is interest? Is there a definition?**

(AU.5) There is no legal definition of the term ‘interest’ by law. According to Austria’s most popular textbook on civil law, interest is understood as ‘remuneration for the use of capital, to be calculated as a percentage of the capital per time unit.’ Default interest (Verzugszinsen), on the other hand, is not understood as remuneration for a prolonged use of the capital, but is compensation for damages.<sup>91</sup> It is a claim that arises from tort law, as it should compensate for the damages that ensue from the default.<sup>92</sup>

### **1.2. When, and under what conditions, is interest payable at all? Does this depend on whether the claim is brought in tort, breach of contract or (where applicable) restitution/unjust enrichment?**

(AU.6) Interest is payable if and when the claimant (creditor) brings a claim for the principal amount and asks for interest as an accessory claim, or if a claim solely consisting of interest is brought. The court may not award more than the claimant has asked for (principle of *ne ultra petita*): § 405 ZPO (Austrian Code of Civil Procedure)<sup>93</sup> explicitly states that this rule also applies to interest.<sup>94</sup>

(AU.7) Interest can be claimed for any delay in payment; the law does not distinguish in this regard.

### **1.3. Is payment of interest compulsory or at the discretion of the court?**

(AU.8) Payment of interest, when claimed, is not at the discretion of the court. In particular, and despite some scholarly views to the contrary, the court has no statutory right to reduce the

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<sup>88</sup> See § 54(2) Jurisdiktionsnorm (JN; Jurisdictional Norm), RGBI 111/1895, last amended by BGBl I 87/2015; see also Austrian Supreme Court, case 4 Ob 511/90.

<sup>89</sup> Damages claims with a litigation value of up to €15,000 must be brought before the District Courts, damages claims exceeding this value before the Regional Courts or, where the damages claim results out of commercial transactions, before the Commercial Court (§§ 49(1), 50, 51(1)(1) JN).

<sup>90</sup> See Aichberger-Beig in Kletečka/Schauer (eds), *ABGB-ON*<sup>1.01</sup> § 1000 ABGB (1 June 2014, rdb.at) para 7.

<sup>91</sup> Welser/Zöchling-Jud, *Grundriss des bürgerlichen Rechts* (14th edn, Manz 2015) para 169 with further references.

<sup>92</sup> Größ in Kletečka/Schauer, *ABGB-ON*<sup>1.02</sup> § 1000 ABGB (1 March 2015, rdb.at) para 2. While there is some controversy in Austrian literature as to whether interest payments are based in tort, unjust enrichment or a combination of the two, the Supreme Court has consistently awarded them as damages in tort; for a recent contribution to this discussion, including numerous references, see Bydlinski, ‘Der Anspruch auf gesetzliche Verzugszinsen’ in Apathy/Bollenberger/Bydlinski/Iro/Karnet/Karollus (eds), *Festschrift für Helmut Koziol zum 70. Geburtstag* (Jan Sramek 2010) 21.

<sup>93</sup> Zivilprozessordnung (ZPO; Austrian Code of Civil Procedure), RGBI 113/1895, last amended by BGBl I 94/2015.

<sup>94</sup> Fucik in Fasching/Konecny (eds), *Zivilprozessgesetze* (2nd edn, 30 April 2004, rdb.at) § 405 ZPO paras 4 ff (‘ne eat iudex ultra petita partium’).

interest payable under § 1333 ABGB.<sup>95</sup> Under § 1333 ABGB, interest payment is mandatory even if the debtor has not actually benefitted from<sup>96</sup> or is not responsible for the delay.<sup>97</sup>

#### 1.4. What is said to be the purpose of the interest payment?

(AU.9) The aim of the payment of default interest is to provide a lump sum to cover the damages that the creditor has suffered because of the debtor's delayed payment.<sup>98</sup> The Austrian Supreme Court has consistently held that 'under § 1333 ABGB and tort rules, the damages caused by a delay – be it based on contractual liability or legal liability in tort – qualify as a minimum lump sum that the harmed party can claim irrespective of proof of concrete damage.'<sup>99</sup>

#### 1.5. What is the legal basis for the payment of interest (statutes, contractual agreements, case-law, soft law guidance)?

(AU.10) Statutes are generally the basis for the payment of interest (in particular, the competition law-specific § 37a KartG, §§ 1000 and 1333 ABGB on general civil law and § 456 UGB in commercial transactions). On these provisions, see below.

(AU.11) However, the interest rate may also be decided on contractually between the parties. The possibility of providing for simple or compound interest (rates) in contracts is explicitly acknowledged in § 1000 paras 1 and 2 ABGB. Where consumers are involved, however, contractually agreed interest rates may be subject to limitations.<sup>100</sup>

### Section II. Calculation of Interest

#### 2.1. What is the rate of interest that is set? How is it arrived at? Are there statutes?

##### *Interest for damages for competition law infringements today*

(AU.12) § 37a para 1 fourth sentence KartG is a provision of a civil law nature and states that default interest must be paid for the damages that one is entitled to based on an infringement of competition law starting from the time at which the harm occurred.<sup>101</sup> The provision also states

<sup>95</sup> Such a right can be found for contractual penalties; see § 1336 para 2 ABGB. In the literature, it is sometimes argued that courts should also have a right to reduce the amount of interest payable; for a discussion see Größ in Kletečka/Schauer (eds), *ABGB-ON*<sup>1.02</sup> (1 March 2015, rdb.at) § 1000 ABGB paras 8-10 (also holding that under § 456 UGB this should not be possible, as this provision transposes a Directive); Reischauer in Rummel (ed), *ABGB* (3rd edn, 1 January 2004, rdb.at) § 1333 ABGB para 9 (admitting that based on Supreme Court case law judges may probably not reduce the interest payable; but also – not very convincingly – holding that the flexible interest rate for commercial transactions might be open for reductions based on proof that the actual harm incurred due to the late payment was lower than the statutory interest rate); Dullinger in Jabornegg/Artmann (eds), *Kommentar zum UGB* (vol 1, 2nd edn, Springer 2010) § 352 para 5.

<sup>96</sup> Graf, 'Zinsen, Bereicherung und Verjährung', *Juristische Blätter* 1990, 350 (356).

<sup>97</sup> Danzl in Koziol/Bydlinski/Bollenberger (eds), *Kurzkomentar zum ABGB* (3rd edn, Springer 2010) § 1333 para 3.

<sup>98</sup> Danzl in Koziol/Bydlinski/Bollenberger (eds), *Kurzkomentar zum ABGB* (3rd edn, Springer 2010) § 1333 para 4; ErläutRV 1167 BlgNR 22. GP 9.

<sup>99</sup> RS0109502 ('Rechtssätze' are legal principles established in the case law of the Austrian Supreme Court; they are collected on the freely-accessible Legal Information System of the Republic of Austria at ris.bka.gv.at and list a number of judgments in which these legal principles were established).

<sup>100</sup> See Dehn, 'Das Zinsenrechts-Änderungsgesetz', *Recht der Wirtschaft* 2002, 514 (516) (containing further references).

<sup>101</sup> On this provision, see also Krenn, *Private Enforcement* (Verlag Österreich 2014) 110 ff.

that § 1333 ABGB applies to these interest payments *mutatis mutandis*.<sup>102</sup> According to the explanatory remarks accompanying the government bill introducing § 37a KartG, this provision was explicitly modelled on the German Seventh Reform of Antitrust Law in 2005, and in particular § 33 para 3 German GWB (*Gesetz gegen Wettbewerbsbeschränkungen*).<sup>103</sup> § 37a KartG applies to competition law infringements committed after 28 February 2013.

- (AU.13) § 1333 ABGB states in its first paragraph that ‘The damage which the debtor has inflicted on his creditor by delaying the payment of a monetary claim is compensated by the payment of statutory interest (§ 1000 para 1).’<sup>104</sup> § 1000 para 1 ABGB sets the statutory interest rate at 4% pa – unless the law foresees a different interest rate.
- (AU.14) § 1000 para 2 ABGB also sets the rate of compound interest at 4% pa, irrespective of whether a higher statutory interest rate applies for single interest.
- (AU.15) Concerning § 1000 para 1 ABGB’s reference to possible other statutory interest rates, regard should be had to the Austrian Commercial Code (*Unternehmensgesetzbuch* or UGB): § 456 UGB foresees a higher statutory interest rate for commercial transactions. For this higher interest rate to apply, the damages sought must be classified as contractual damages between commercial parties. This will, in my opinion, often apply to damages for competition law infringements where the parties concerned (eg, cartel and company harmed by the cartel) maintained a contractual relationship. For damages claims which are purely based on tort, however, the general (lower) statutory interest rate will also apply between companies.<sup>105</sup>
- (AU.16) § 456 UGB applies to commercial contracts entered into on or after 16 March 2013.<sup>106</sup> While Art 2(1) Directive 2011/7/EU, which these provisions implement, only requires that the elevated commercial interest rate apply to commercial transactions which lead to the delivery of goods or the provision of services for remuneration, the Austrian legislator has chosen to apply it more broadly, eg also to contractual damages.<sup>107</sup> This has explicitly been recognized by the Austrian Supreme Court, which has held that the higher interest rate for commercial transactions generally applies for any late payment resulting from commercial transactions, including from (contractual) damages claims. It is not relevant whether the claim arises from the parties’ main contractual obligations, or accessory ones.<sup>108</sup>
- (AU.17) § 456 UGB states that where a payment is delayed, the debtor must pay interest amounting to 9.2% above the base rate. The base rate that applies on the first calendar day of each half-year applies for that half-year. Should the base rate have a negative value, as is currently the case,

<sup>102</sup> Original of § 37a(1) fourth sentence KartG: ‘Die Schadenersatzforderung hat das Unternehmen ab Eintritt des Schadens in sinngemäßer Anwendung des § 1333 ABGB zu verzinsen.’

<sup>103</sup> ErläutRV 1804 BlgNR 24. GP 10.

<sup>104</sup> Author’s own translation. Original: ‘Der Schaden, den der Schuldner seinem Gläubiger durch die Verzögerung der Zahlung einer Geldforderung zugefügt hat, wird durch die gesetzlichen Zinsen (§ 1000 Abs. 1) vergütet.’

<sup>105</sup> Dehn, ‘Das Zinsenrechts-Änderungsgesetz’, *Recht der Wirtschaft* 2002, 514 (515).

<sup>106</sup> See § 455 UGB and the transitional provision of § 906 para 25 UGB. For commercial contracts entered into before that date, § 352 UGB in its previous version applies.

<sup>107</sup> See ErläutRV 1167 BlgNR 22. GP 10 and its discussion by Haberer/Zehetner in Straube (ed), *UGB* (vol 1, 4th edn, March 2014, rdb.at) § 455 para 14.

<sup>108</sup> Original quote from Austrian Supreme Court, case 6 Ob 15/06h: ‘Die Bestimmung [then: § 1333 para 2 ABGB; now: § 456 UGB] gilt daher generell für jede verspätete Zahlung von Geldforderungen zwischen Unternehmern aus einem unternehmerischen Geschäft und zwar auch für Schadenersatzforderungen [...] und unabhängig davon, um welchen Vertragstyp es sich handelt. Es kann daher auch nicht entscheidend sein, ob die Geldforderung aus der Verletzung einer vertragstypischen Hauptleistung oder einer vertraglichen Nebenpflicht resultiert.’

the Austrian legislator has foreseen that the statutory interest rate may never go below zero.<sup>109</sup> In a case where the debtor is not responsible for the delay (ie, not even slightly negligent), he only has to pay the lower interest according to § 1000 para 1 ABGB, ie 4% pa.

- (AU.18) Before March 2013, when the current regime under § 37a KartG and § 456 UGB entered into force, §§ 1000, 1333 ABGB and § 352 UGB/HGB<sup>110</sup> applied, but in several versions. These will be set out below.

*Interest for damages for competition law infringements until 31 July 2002*

- (AU.19) Between 1 January 1812<sup>111</sup> and 31 July 2002, § 1333 ABGB foresaw that statutory interest under (then) § 995 ABGB applied; however, the latter provision was already abolished in 1868 and replaced by § 2 Law 62/1868,<sup>112</sup> which stated that the statutory interest rate amounted to 4% pa.
- (AU.20) From 1 March 1939 until 31 July 2002, § 352 para 1 HGB foresaw a statutory interest rate of 5% pa in commercial matters.<sup>113</sup> § 353 HGB stated that in commercial transactions interest had to be paid from the day that a payment was due, while under general Austrian civil law interest must be paid from the day following the day on which the payment is due.<sup>114</sup>
- (AU.21) Under § 3(b) Law 62/1868, the statutory interest rate also applied for compound interest.

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<sup>109</sup> § 1(1a) Law on Euro-Related Amendments to Civil Legislation, BGBl I 125/1998, as amended by BGBl I 51/2013. This clarifies that where the base rate has a negative value, this can lower the statutory interest rate – but never below zero. On this, see Zöchling-Jud, ‘Zum Einfluss von negativen Referenzwerten auf Kreditzinsen’, Österreichisches BankArchiv 2015, 318 (327) with further references.

<sup>110</sup> Following a reform in 2005, the Commercial Code was renamed from Handelsgesetzbuch (HGB) to Unternehmensgesetzbuch (UGB); see BGBl I 120/2005.

<sup>111</sup> JGS 946/1811.

<sup>112</sup> The original version of 1868 foresaw a statutory interest rate of 6% pa, which was reduced to 5% pa by RGBI 1885/77. BGBl 252/1924 doubled the statutory interest rate to 10% pa, and the commercial statutory interest in § 287 HGB from 6% pa to 12% pa. At the same time, the Chancellor was authorized to change any statutory interest rates by decree. By RGBI 231/1938 (page 2008), general statutory interest in that law was again reduced to the rate of 4% pa, and has remained at this rate ever since. The law of 1868 was only repealed and replaced in 2002, by Art VII(3) of BGBl I 118/2002.

<sup>113</sup> See RGBI 231/1938 (page 2008).

<sup>114</sup> ErläutRV 1167 BlgNR 22. GP 16.

*Interest for damages for competition law infringements between 1 August 2002 and 31 December 2006*

- (AU.22) On 1 August 2002, § 1000 and § 1333 para 1 ABGB as they still stand today entered into force (on this see already above).
- (AU.23) Between 1 August 2002 and 31 December 2006, an amended § 352 HGB referred to the ABGB for interest rates, which now foresaw a special statutory interest rate for commercial transactions amounting to 8% above the base rate in its § 1333 para 2. The base rate that applied on the last calendar day of each half-year was relevant for the following half-year. This higher commercial interest rate applied irrespective of whether the creditor was responsible for the delayed payment, and was labeled the most serious change under the new law.<sup>115</sup>
- (AU.24) The newly worded § 1333 para 2 ABGB applied to interest sought from 1 August 2002 onwards, even if the claims predated the provision's entering into force.<sup>116</sup> For commercial transactions, this meant that 5% pa interest could be claimed for late payments until 31 July 2002, and 8% above the base rate thereafter.<sup>117</sup> For compound interest, this meant that from 1 August 2002 onwards only 4% pa could be claimed in compound interest, even if the statutory (single) interest rate (which the previous law, § 3(b) Law 62/1868, had declared applicable for the compound interest rate) was higher, as was the case for commercial transactions (§ 1000 para 2 ABGB).
- (AU.25) The 2002 reform repealed § 353 HGB, as it was held that the new – higher – interest rate for commercial transactions no longer made it necessary to let interest start to accrue from the date that a payment becomes due; all interest now accrued from the day following that due date.<sup>118</sup>

*Interest for damages for competition law infringements between 1 January 2007 and 15 March 2013, between companies in commercial transactions*

- (AU.26) On 1 January 2007, the Commercial Code was renamed from *Handelsgesetzbuch* (HGB) to *Unternehmensgesetzbuch* (UGB) and substantially amended.<sup>119</sup> The former § 1333 para 2 ABGB was – word by word – re-introduced into the Commercial Code, in § 352 UGB. The interest rate therefore continued to range at 8% above the base rate, with the base rate applicable on the last calendar day of each half-year being relevant for the following half-year. The rate for compound interest remained the same (4% pa under § 1000 para 2 ABGB). Under (then) § 907 para 18 UGB, § 352 UGB was to apply for any contracts entered into after 31 December 2006. This provision continues to apply to commercial contracts concluded before 16 March 2013, when § 456 UGB entered into force.

*Further questions relating to interest for damages for competition law infringements*

- (AU.27) Should the statutory interest rate not cover the damages that the claimant actually incurred through the delayed payment, then this can be claimed as positive damages under § 1293

<sup>115</sup> Graf, 'Die Neureglung der Rechtsfolgen des Zahlungsverzugs', *wirtschaftsrechtliche blätter* 2002, 437 (440). This change was taken back again in a 2013 reform (see below).

<sup>116</sup> ErläutRV 1167 BlgNR 22. GP 18; Griss in Koziol/Bydlinski/Bollenberger (eds), *Kurzkomentar zum ABGB* (3rd edn, Springer 2010) § 1000 para 1.

<sup>117</sup> Spunda, 'Änderungen durch das Zinsenrechts-Änderungsgesetz (ZinsRÄG)', *ecolox* 2002, 653 (653).

<sup>118</sup> ErläutRV 1167 BlgNR 22. GP 16 (last sentence).

<sup>119</sup> HaRÄG 2005, BGBl I 120/2005.

ABGB, provided the debtor has acted at least slightly negligently.<sup>120</sup> For the calculation of positive damages from the date of the harm until the date the claim is lodged at court, judges might rely on the statutory interest rate in order to estimate this positive damage, as is permitted under § 273 ZPO.

- (AU.28) Where several companies are jointly liable for damages due to competition law infringements (§ 1302 ABGB), it is possible that different statutory interest rates apply. For instance, a cartel member who has maintained a contractual relationship regarding the cartelized product with another company might have to pay the higher statutory interest rate of 9.2% above the base rate under § 456 UGB, while another cartel member of the same cartel who did not maintain any such contractual relationship will only have to pay the lower statutory interest rate of 4% pa under § 1000 para 1 ABGB. Amongst jointly liable parties, default interest is not recoverable where the joint obligation does not extend to it (§ 896 ABGB).<sup>121</sup> In cases of joint liability, the Austrian Supreme Court has established that late payment, fault and requests for payment only have a subjective effect; when a claimant brings a claim for damages in court against one jointly liable party, default interest only starts to accrue as regards that party and not for the other jointly liable parties.<sup>122</sup> Default interest therefore does not form part of the joint obligation.<sup>123</sup> In clear contrast § 37a KartG now requires, in line with EU law, that interest start to accrue from the day of the harm. The Austrian Supreme Court had argued that for damages arising out of tort, the interest does not form part of the joint obligation *because* it only starts to accrue against the party from which payment is claimed.<sup>124</sup> With a view to § 37a KartG, this reasoning no longer holds true for competition law infringements; under the new provision, interest for damages due to competition law infringements should therefore form part of the parties' joint obligation. In this respect, however, difficulties might arise where jointly liable parties are subject to different statutory interest rates. In such a case, I would argue that the joint liability should at least encompass the lower statutory interest, while only the party liable for the higher statutory interest should be liable for the exceeding interest.

## 2.2. Is interest simple or compound? If the interest is neither simple nor compound as defined above, please elaborate.

- (AU.29) Up until the point in time when a claim for damages and interest is lodged with a court, the interest is simple.

### *Compound interest today*

- (AU.30) Based on the express provision of § 1000 para 2 ABGB, a party can claim interest on the interest due (compound interest) if the parties have expressly agreed on this. In any case, however, a party can claim compound interest starting from the day on which the claim is lodged with a court (*'Streitanhängigkeit'* or pendency).<sup>125</sup> A claim is pendent when the

<sup>120</sup> See Austrian Supreme Court, case 1 Ob 315/97y; RS0109502; Reischauer in Rummel (ed), *ABGB* (3rd edn, 1 January 2004, rdb.at) § 1333 ABGB para 7; Perner in Schwimann/Kodek (eds), *ABGB-Praxiskommentar* (vol 4, 4th edn, LexisNexis 2014) § 1000 ABGB para 8.

<sup>121</sup> Gamerith/Wendehorst in Rummel/Lukas (eds), *ABGB* (4th edn, 1 November 2014, rdb.at) § 896 para 24; Kodek in Kletečka/Schauer (eds), *ABGB-ON*<sup>1.01</sup> (1 October 2013, rdb.at) § 896 ABGB para 17.

<sup>122</sup> RS0017419; Schacherreiter in Kletečka/Schauer (eds), *ABGB-ON*<sup>1.03</sup> (1 June 2015, rdb.at) § 1302 ABGB para 70.

<sup>123</sup> Karner in Koziol/Bydlinski/Bollenberger (eds), *Kurzkomentar zum ABGB* (3rd edn, Springer 2010) § 1302 para 14; Schacherreiter in Kletečka/Schauer (eds), *ABGB-ON*<sup>1.03</sup> (1 June 2015, rdb.at) § 1302 ABGB para 70.

<sup>124</sup> Austrian Supreme Court, case 4 Ob 539/89.

<sup>125</sup> See, explicitly, ErläutRV 1167 BlgNR 22. GP 9.



defendant has been served the claimant's writ containing the claim.<sup>126</sup> As set out above, where no agreement has been made regarding the rate of compound interest this is set at 4% pa. This interest rate for compound interest also applies in cases in which the statutory interest rate for simple interest is higher, for instance for commercial transactions.<sup>127</sup>

### *Compound interest until 31 July 2002*

- (AU.31) Before the entering into force of § 1000 para 2 ABGB on 1 August 2002, parties could also claim compound interest, based on § 3(b) Law 62/1868; the compound interest rate was identical to the statutory interest rate and was therefore not necessarily limited to 4% pa. Under that law, compound interest could also be claimed from the day the defendant was served the claimant's writ containing the claim.<sup>128</sup>

### **2.3. What is the time for which interest is calculated? When does interest start to accrue, when does the accrual of interest end? Are there any situations where the action of the plaintiff, for example delay on his part, serves to change the time for which interest is calculated? Are there provisions for suspension of the accrual of interest?**

#### *Start of the accrual of interest*

- (AU.32) Based on the express provision in § 37a KartG, interest starts to accrue as soon as the harm resulting from the competition law infringement has occurred. While the law does not define that point in time, one could argue that this should, for instance, be the time at which a contract relating to a cartelized product is signed, rather than the time at which the price for that product was paid.<sup>129</sup>
- (AU.33) § 37a KartG only applies to competition law infringements that were committed after 28 February 2013 (see § 86 para 4 last sentence KartG).<sup>130</sup>
- (AU.34) For competition law infringements committed before 1 March 2013, one must distinguish: Up until 31 July 2002, default interest for contractual damages in commercial transactions started to accrue on the day that a payment was due (§ 353 HGB), while under general civil law default interest had to be paid from the day following the day on which the payment was due (§ 903 in conjunction with § 1334 ABGB).<sup>131</sup> Starting on 1 August 2002, interest always only started to accrue from the day following the day on which the payment is due, as § 353 HGB was repealed.
- (AU.35) For the accrual of interest before 1 March 2013, it is therefore decisive when a payment (eg, damages) became due. Under § 903 in conjunction with § 1334 ABGB, interest generally

<sup>126</sup> On this, see § 232(1) Zivilprozessordnung (Civil Procedure Law); Griss in Koziol/Bydlinski/Bollenberger (eds), *Kurzkomentar zum ABGB* (3rd edn, Springer 2010) § 1000 para 4; Aichberger-Beig in Kletečka/Schauer, *ABGB-ON*<sup>1.01</sup> (1 June 2014, rdb.at) § 1000 ABGB para 4; Graf, 'Die Neuordnung der Rechtsfolgen des Zahlungsverzugs', *wirtschaftsrechtliche blätter* 2002, 437 (445).

<sup>127</sup> See ErläutRV 1167 BlgNR 22. GP 9.

<sup>128</sup> See, in this respect, Austrian Supreme Court, case 4 Ob 84/97z; on diverging opinions in the literature see the references in ErläutRV 1167 BlgNR 22. GP 9.

<sup>129</sup> In this respect, see Krenn, *Private Enforcement* (Verlag Österreich 2014) 112 with further references.

<sup>130</sup> On the situation before § 37a KartG, see also Wollmann/Prisker, 'Austria' as part of the Ashurst Study <[http://ec.europa.eu/competition/antitrust/actionsdamages/national\\_reports/austria\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/austria_en.pdf)> accessed 19 October 2015.

<sup>131</sup> Perner in Schwimann/Kodek (eds), *ABGB-Praxiskomentar* (vol 4, 4th edn, LexisNexis 2014) § 1000 ABGB para 3; ErläutRV 1167 BlgNR 22. GP 15.

becomes due on the day on which the debtor should have made the payment (based on a contract or the law).<sup>132</sup> Where the amount of the claim is not yet determined, the claim becomes due with the debtor's receipt of the invoice or a similar request for payment. For half a century, the Austrian Supreme Court has consistently relied on the following legal principle: 'Die Fälligkeit einer Schadenersatzforderung tritt erst ein, wenn der Schaden feststellbar und zumindest vom Beschädigten zahlenmäßig bestimmt worden ist.' ('A claim for damages becomes due when the damage is ascertainable or is at least precisely designated by the harmed party').<sup>133</sup> This firmly settled case law is also reflected in Austrian academia.<sup>134</sup>

- (AU.36) A minority opinion expressed in a recent Austrian doctoral thesis holds that – contrary to settled case law – a damages claim should become due as soon as the harm has occurred.<sup>135</sup> However, this minority opinion must be understood *de lege ferenda* and not *de lege lata*. This also becomes clear when reading § 86 para 4 KartG, which expressly states that § 37a KartG – which lets interest on damages for competition law infringements accrue from the occurrence of the harm and thereby breaks with Austrian legal tradition – must only be applied for competition law infringements committed on or after 1 March 2013.

### *End of the accrual of interest*

- (AU.37) The accrual of interest ends when the damages (including interest) have been paid. Following a preliminary ruling of the CJEU,<sup>136</sup> and where payments are made by bank transfer, it was held in Austrian literature that – at least within the sphere of application of Art 3(1)(c)(ii) Directive 2000/35/EC – the debtor may only avoid or put an end to the application of interest for late payment where the sum due is credited to the account of the creditor within the period for payment.<sup>137</sup> In 2013, a new provision (§ 907a ABGB) was adopted based on this case law which applies to legal relations entered into from 16 March 2013 onwards.<sup>138</sup> For payments for which the due date is not yet predetermined, however, and which become due when a request for payment is made – as is generally the case for damages claims –, § 907a para 2 ABGB states that the debtor pays on time if he arranges for the bank transfer without undue delay.

<sup>132</sup> On this, see *ibid.*

<sup>133</sup> RS0023392. On this issue under general civil law, see amongst many others the following recent cases: Austrian Supreme Court, cases 1 Ob 28/11s, 7 Ob 9/13v, 7 Ob 54/14p, 9 Ob 2/14f. On this settled case law, see also Schwebisch, *Die gesetzlichen Fälligkeitskonzepte des ABGB* (Manz 2015) 139 f.

<sup>134</sup> On this, see Schwebisch, *Die gesetzlichen Fälligkeitskonzepte des ABGB* (Manz 2015) 137 f (also referring to the writings of Supreme Court judges, eg Michael Bydlinski).

<sup>135</sup> Schwebisch, *Die gesetzlichen Fälligkeitskonzepte des ABGB* (Manz 2015) 134 ff (referring to several other authors of the same opinion, many of them writing before the Austrian Supreme Court established the legal principle in RS0023392 which it has consistently relied on since the 1960s, eg Stubenrauch in 1903, Randa in 1913, Ehrenzweig in 1928, Wilburg in 1932 and the Klang commentary of 1951; at 137, she acknowledges that authors from the more recent past have adopted the Supreme Court's approach), in particular see the author's summarized opinion at 145.

<sup>136</sup> Case C-306/06, *01051 Telecom/Deutsche Telekom*, ECLI:EU:C:2008:187.

<sup>137</sup> Dullinger in Jabornegg/Artmann (eds), *Kommentar zum UGB* (vol 1, 2nd edn, Springer 2010) § 352 para 6; Dullinger, 'Zur Bedeutung des Zahlungseingangs bei der Geldschuld im Lichte der Zahlungsverzugsrichtlinie' in Apathy/Bollenberger/Bydlinski/Iro/Karnet/Karollus (eds), *Festschrift für Helmut Koziol zum 70. Geburtstag* (Jan Sramek 2010) 97.

<sup>138</sup> ZaRÄG, BGBl I 50/2013; see the transition provision in § 1503 para 2 lit 1 ABGB (no retroactive application).

*Further rules on accrual of interest*

- (AU.38) Relating to provisions that would lead to a change in the time for which interest is calculated, one should underline that the plaintiff's action was decisive for competition law infringements that took place before 1 March 2013, as interest only started to accrue as soon as the amount of interest was made known to the competition law infringer(s).
- (AU.39) Interest must be paid irrespective of the debtor's fault.<sup>139</sup> However, in commercial transactions the lower statutory interest rate of 4% pa may apply where the debtor was not even slightly negligent (§ 456 UGB).
- (AU.40) Relating to the suspension of the accrual of interest, the aggrieved party under general civil law may not let the interest accrue beyond the principal amount of damages requested without lodging a claim with a court (§ 1335 ABGB, principle of *ultra alterum tantum*);<sup>140</sup> from the date of filing interest can continue accruing again. This rule is not applicable in commercial matters.<sup>141</sup>
- (AU.41) Finally, it should be pointed out that damages – and the interest payable on these – often relate to competition law infringements that occurred a relatively long time ago. Questions of limitation will therefore frequently arise. While this aspect lies outside the scope of the present report, two provisions should be briefly pointed out: § 1480 ABGB on limitation periods for bringing claims relating to interest payments,<sup>142</sup> and § 37a para 4 KartG on the suspension of limitation periods during ongoing competition law proceedings.<sup>143</sup>

**2.4. Are there any specific provisions if payment is requested in a different currency than that in the state where the lawsuit is brought? (e.g. a Swedish company claims for damages resulting from an EU-wide cartel against a German cartel member in Germany. Can the court award only EUR or also Swedish Krona?)**

- (AU.42) Austria's official currency is the Euro,<sup>144</sup> and judgments generally also award damages and interest in Euro.<sup>145</sup> However, as was already the case under Austria's Schilling currency before the Euro, monetary claims can also be brought in foreign currencies.<sup>146</sup> The form issued as a ministerial decree which must be used for monetary claims in the form of default actions, for

<sup>139</sup> Danzl in Koziol/Bydlinski/Bollenberger (eds), *Kurzkomentar zum ABGB* (3rd edn, Springer 2010) § 1333 para 3.

<sup>140</sup> Spunda, 'Änderungen durch das Zinsenrechts-Änderungsgesetz (ZinsRÄG)', *ecolex* 2002, 653 (655).

<sup>141</sup> This rule has long been present in Austrian commercial law, but was located in different provisions over the course of time: On 1 August 2002, a sentence was introduced into § 1335 ABGB which said that this principle applied except in commercial matters (Art I(2) and II(2) of BGBl I 118/2002). This sentence, however, was again deleted with effect from 1 January 2007, and introduced into the newly worded § 353 UGB (BGBl I 120/2005).

<sup>142</sup> On this, see M. Bydlinski in Rummel (ed), *ABGB*<sup>3</sup> (1 January 2002, rdb.at) § 1480 para 1 1 (stating that the three year limitation period may be calculated from the day that the interest is due or from the day on which a claim for the payment of interest is objectively possible); Dehn in Koziol/Bydlinski/Bollenberger (eds), *Kurzkomentar zum ABGB* (3rd edn, Springer 2010) § 1480 ABGB para 3. The absolute time limit is thirty years from the event giving rise to the claim.

<sup>143</sup> This rule must necessarily apply not only to the damages themselves, but also to the interest for the damages in question.

<sup>144</sup> Austria's official currency has been the Euro since 1 January 2002; see § 1 Eurogesetz (Law on the Euro), BGBl I 72/2000.

<sup>145</sup> On the courts' duty in this respect, see § 3(2)(2) Eurogesetz – and the exception under para 3 of that provision.

<sup>146</sup> Acknowledging this possibility: Kodek in Fasching/Konecny (eds), *Zivilprozessgesetze* (2nd edn, 30 April 2004, rdb.at) § 250 ZPO paras 4, 50; Bosina/Schneider, *Das neue Mahnverfahren und die ADV-Drittschuldneranfrage* (1987) para 551; Gitschthaler in Fasching/Konecny (eds), *Zivilprozessgesetze* (3rd edn, 30 November 2013, rdb.at) § 54 JN para 21.

instance, underlines on several occasions that one must specify the currency of the claim.<sup>147</sup> Also, until recently there was a provision in the ABGB that stated that interest relating to loans must be paid in the same currency as the capital itself.<sup>148</sup>

- (AU.43) Bringing a claim in a foreign currency will not affect the substantive provisions on statutory interest. Default interest at the statutory rate must be paid in the currency of the principal amount.<sup>149</sup>
- (AU.44) In order to determine the litigation value, the monetary claim in a foreign currency must be converted into Euro, at the exchange rate applicable on the day that the claim reached the court.<sup>150</sup> Attorney fees, which in Austria are calculated on the basis of the litigation value, will be calculated based on the exchange rate applicable on the day the case is decided.<sup>151</sup>

**2.5. As damage claims for infringements of EU competition rules often pertain to long-running infringements, please include all applicable interest rates and the date the rate came into force from 1 January 1985 until today. Unless impossible due to national peculiarities, the rates should be listed in a two column table, containing the rate and the date it came into force. This should be accompanied by a legal retrospective that sets out any other changes to the relevant interest regime (e.g. the time interest starts to run, etc.) which occurred over this period, in order to allow a determination of which rules applied at a given point in time between 1 January 1985 and today.**

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<sup>147</sup> See ADV-Form Verordnung 2002, BGBl II 510/2002, last amended by BGBl II 45/2013. For monetary claims, ZPForm58a must be used (§ 1(1)(1) ADV-Form Verordnung).

<sup>148</sup> § 999 ABGB, repealed by BGBl I 28/2010.

<sup>149</sup> Harrer in Schwimann (ed), *ABGB-Praxiskommentar* (vol 6, 3rd edn, LexisNexis 2006) § 1333 ABGB para 3 (with reference to Austrian Supreme Court, case 4 Ob 588/79).

<sup>150</sup> Gitschthaler in Fasching/Konecny (eds), *Zivilprozessgesetze* (3rd edn, 30 November 2013, rdb.at) § 54 JN para 21.

<sup>151</sup> § 6 Rechtsanwaltstarifgesetz (RATG; Attorney Fees Act), BGBl 189/1969, last amended by BGBl I 13/2014.

Table 1 – General Statutory Interest Rates

Date	Rate
01/08/2002 (§ 1000 para 1 ABGB)	4.00%
01/03/1939 (§ 2 Law 62/1868)	4.00%

Table 2 – Commercial Statutory Interest Rates

Date	Rate
16/03/2013 (§ 456 UGB) <sup>152</sup>	9.20% above base rate <i>OR</i> 4% <sup>153</sup>
01/01/2007 (§ 352 UGB) <sup>154</sup>	8.00% above base rate
01/08/2002 (§ 1333 para 2 ABGB) <sup>155</sup>	8.00% above base rate
01/03/1939 (§ 352 para 1 HGB)	5.00%

Table 3 – Commercial Statutory Interest Rates based on the Base Rate

Date	Base rate <sup>156</sup>	Calculated interest rate
<i>16/03/2013 (§ 456 UGB)<sup>157</sup></i>		<i>9.20% above base rate</i>
01/07/2015	-0.12%	9.08%
01/01/2015	-0.12%	9.08%
01/07/2014	-0.12%	9.08%
01/01/2014	-0.12%	9.08%
01/07/2013	-0.12%	9.08%
01/01/2013	0.38%	9.58%
<i>01/01/2007 (§ 352 UGB)<sup>158</sup></i>		<i>8.00% above base rate</i>
30/06/2015	-0.12%	7.88%
31/12/2014	-0.12%	7.88%
30/06/2014	-0.12%	7.88%
31/12/2013	-0.12%	7.88%
30/06/2013	-0.12%	7.88%
31/12/2012	0.38%	8.38%

<sup>152</sup> § 456 UGB only applies to commercial contracts concluded on or after 16 March 2013; see the transitional provision of § 906 para 25 UGB.

<sup>153</sup> The 4% pa interest rate applies if the debtor did not even act slightly negligently; this is very unlikely in cases relating to competition law infringements.

<sup>154</sup> The interest rate of 8% above the base rate applies to any commercial contracts entered into until 15 March 2013, and is therefore also relevant for claims brought in court today that relate to such contracts.

<sup>155</sup> § 1333 para 2 ABGB in its version of 1 August 2002 applied to interest payments for the time on or after 1 August 2002, even if the commercial contracts giving rise to the claim predated the provision's entering into force; interest for the time before 1 August 2002 could only be claimed based on the then-applicable rate, ie 5% pa.

<sup>156</sup> Source: <https://www.oenb.at/Service/Zins--und-Wechselkurse/Ankneuepfungszinssatze.html>.

<sup>157</sup> § 456 UGB only applies to commercial contracts concluded on or after 16 March 2013; see the transitional provision of § 906 para 25 UGB.

<sup>158</sup> The interest rate of 8% above the base rate applies to any commercial contracts entered into until 15 March 2013, and is therefore also relevant for claims brought in court today that relate to such contracts.

30/06/2012	0.38%	8.38%
31/12/2011	0.38%	8.38%
30/06/2011	0.38%	8.38%
31/12/2010	0.38%	8.38%
30/06/2010	0.38%	8.38%
31/12/2009	0.38%	8.38%
30/06/2009	0.38%	8.38%
31/12/2008	1.88%	9.88%
30/06/2008	3.19%	11.19%
31/12/2007	3.19%	11.19%
30/06/2007	3.19%	11.19%
31/12/2006	2.67%	10.67%
01/08/2002 (§ 1333 para 2 ABGB) <sup>159</sup>		8.00% above base rate
30/06/2006	1.97%	9.97%
31/12/2005	1.47%	9.47%
30/06/2005	1.47%	9.47%
31/12/2004	1.47%	9.47%
30/06/2004	1.47%	9.47%
31/12/2003	1.47%	9.47%
30/06/2003	1.47%	9.47%
31/12/2002	2.20%	10.20%
30/06/2002	2.75%	10.75%

Table 4 – Statutory Compound Interest Rates

Date	Rate
01/08/2002 (§ 1000 para 2 ABGB) <sup>160</sup>	4.00%
01/03/1938 (§ 3(b) Law 62/1868)	equal to statutory interest rate (see Tables 1 & 2)

*Time interest starts to accrue – short legal retrospective*

(AU.45) Competition law infringements committed on or after 1 March 2013: interest for damages for competition law infringements starts to accrue at the time the harm occurred (§ 37a KartG).

(AU.46) Competition law infringements committed before 1 March 2013: interest for damages for competition law infringements starts to accrue following the day on which the claimant specified/quantified the damages (general civil law; §§ 903, 1334 ABGB). As mentioned above, in relation to infringements committed before 1 March 2013, interest from the date of the harm could be claimed as positive damages under § 1293 ABGB, provided the debtor has acted at least slightly negligently. Such approach is recognised in both Austrian scholarship and case law.

<sup>159</sup> § 1333 para 2 ABGB in its version of 1 August 2002 applied to interest payments for the time on or after 1 August 2002, even if the commercial contracts giving rise to the claim predated the provision's entering into force; interest for the time before 1 August 2002 could only be claimed based on the then-applicable rate, ie 5% pa.

<sup>160</sup> Under § 1000 para 2 ABGB, the compound interest rate no longer depends on the applicable statutory interest rate, but is instead fixed at 4% pa.

(AU.47) Interest requested for dates before 1 August 2002: in commercial transactions, interest started to accrue on the day on which the damages became due (§ 353 HGB).

**2.6. Please identify an official, reliable, publicly available source that publishes the pertinent legal interest rates as they change.**

(AU.48) The Austrian National Bank (OeNB) provides up-to-date base rates for calculating the interest based on the new § 456 UGB (for contracts concluded on or after 16 March 2013) and the old § 352 UGB (for commercial contracts concluded before 16 March 2013) on its website.<sup>161</sup> This table reaches back until 30 June 2002. Before 1 January 1999, the OeNB published its own discount rates, but statutory interest was in any case not calculated based on these but was instead fixed at a certain rate.<sup>162</sup>

(AU.49) A number of commercial websites can be helpful in ascertaining the applicable interest rates and in calculating interest, eg Basiszins<sup>163</sup> or Jusline<sup>164</sup>; the latter gives a little legal background to the calculation method used.

**2.7. If interest rates change on a fixed schedule, please indicate the schedule.**

(AU.50) For commercial transactions, the applicable base rate is adjusted every six months (on this, see above at point 2.1).

**2.8. If part of the debt / the damage is being paid, how is interest calculated following that payment? In particular, do partial payments first cover interest or the principal amount? Is there any provision or legal practice similar to Art. 86(3)(2) of the rules of application of Regulation 966/2012 on the financial rules applicable to the general budget of the Union where it is stated that “Any partial payments shall first cover the interest”?**

(AU.51) Based on § 1415 ABGB, it can be ascertained that a sum of money and the interest that relates to it are separate accounts payable.<sup>165</sup> This rule does not only apply to interest due for loans, but also to default interest due for delay.

(AU.52) Unless the parties have agreed otherwise, partial payments first cover the interest, and then the principal amount (§ 1416 ABGB). This rule is advantageous for the creditor, as it means that future interest will be payable on the whole principal amount.<sup>166</sup> The Austrian Supreme Court has held that this rule also applies to interest that is payable for delay.<sup>167</sup> In that judgment, the Supreme Court also held that where a party brings claims for several accounts payable, partial payments first cover the interest for the first claim, then the principal amount of the first claim; then the interest for the second claim, then the principal amount of the first claim; and so on.

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<sup>161</sup> Oesterreichische Nationalbank (OeNB), <https://www.oenb.at/Service/Zins--und-Wechselkurse/Ankneuepfungsinssaetze.html>.

<sup>162</sup> On this change, see Law on Euro-Related Amendments to Civil Legislation, BGBl I 125/1998; see also Austrian Government, Base Rate and Reference Rate Regulation, BGBl II 27/1999.

<sup>163</sup> <http://www.basiszins.at/>

<sup>164</sup> <https://www.jusline.at/zinsrechner.html>

<sup>165</sup> Koziol in Koziol/Bydlinski/Bollenberger (eds), *Kurzkomentar zum ABGB* (3rd edn, Springer 2010) § 1415 para 3.

<sup>166</sup> Koziol in Koziol/Bydlinski/Bollenberger (eds), *Kurzkomentar zum ABGB* (3rd edn, Springer 2010) § 1416 para 3.

<sup>167</sup> Austrian Supreme Court, case 3 Ob 2004/96v.

- 2.9. Please calculate interest in the following hypothetical case. All dates are given in the format dd.mm.yyyy. All amounts are stated without specifying the currency to abstract from implications of the introduction of the common Euro currency. Assume that the claims have not been time barred. Assume that a national court in the Member State on which you are reporting has jurisdiction to rule on the case. Assume that the cartelists are jointly liable for the damage caused by the cartel. If results differ materially depending on whether accrual of interest is based purely on national law or made in compliance with the EU principle of full compensation, provide both calculations.

There was a long running pan-European cartel for a product that materially affected trade between Member States. The cartel lasted from the beginning of 1993 until the dawn raids (unannounced inspections) of the European Commission on 02.02.2009.

On 30.11.2010, a longtime customer of the cartel, who bought the cartelised product in the Member State on which you are reporting, brings a claim for damages against three cartelists (A, B, and C). All of the three defendants have their seat in the Member State on which you are reporting. The customer only bought the cartelised product of the cartelists A and B. In the writ, the claimant specifies the damages caused by the cartel and the date on which the respective damage occurred. The claimant also specifically requests that interest be paid on the damages. The damages (always = 100) and respective dates are set out in Table 5 below.

On 26.11.2013 a court renders a final judgment, ordering the defendant(s) to pay damages and interest. The defendants take until 12.02.2014 to pay. Please specify the total amount the jointly liable defendants have to pay on 12.02.2014 in order to relinquish their debt towards the claimant.

Table 5 - Damage Amounts and Dates

Date the Damage Occurred	Damage Amount
15/11/1993	100
17/09/1996	100
22/02/2006	100
12/08/2008	100

(AU.53) Under Austrian law, it is established that cartelists are jointly liable for the damages caused by their cartel (§ 1302 ABGB).<sup>168</sup>

(AU.54) The competition law-specific provision of § 37a KartG, which provides that interest starts to accrue from the date of the harm, only applies to national or EU competition law infringements that were committed after 28.02.2013.<sup>169</sup> As the present cartel ended on 02.02.2009, the new provision cannot apply and interest only starts to accrue from the day on which the claimant quantified the damages or requested payment from the defendant.<sup>170</sup> This could be done out of court, by a simple letter to the cartelists quantifying the damages. However, as this does not seem to have happened in this hypothetical case, the day that the claim was brought (30.11.2010) is relevant, as the writ of summons quantifies or specifies the damages. To enable

<sup>168</sup> See on this Austrian Supreme Court, case 5 Ob 39/11p.

<sup>169</sup> § 86 para 4 last sentence KartG.

<sup>170</sup> RS0023392: 'Die Fälligkeit einer Schadenersatzforderung tritt erst ein, wenn der Schaden feststellbar und zumindest vom Beschädigten zahlenmäßig bestimmt worden ist.'



calculation, we must assume that the three defendants were also served the claim on 30.11.2010.

- (AU.55) Interest starts to accrue on the day following the quantification of the damages, ie on 01.12.2010. It stops accruing on the day of the actual payment, ie on 12.02.2014.
- (AU.56) Starting from the claim's pendency on 01.12.2010, the claimant could also claim compound interest from all three cartelists, which would always amount to 4% pa (§ 1000 para 2 ABGB). However, this possibility was not entered into the calculations below.
- (AU.57) In our case, the claimant had contractual relations with cartelists A and B. As they are all commercial parties and the damages arose out of a contractual relationship, the claimant can claim the higher statutory interest rate of 8% above the base rate (§ 352 UGB as it stood between 1 January 2007 and 15 March 2013) from A and B. Regarding C, however, the claimant entertained no contractual relationship with that cartelst and can therefore only recover the lower statutory interest rate from it, amounting to 4% pa (§ 1000 para 1 ABGB). These interest rates apply to the damages that the claimant wants to recover, even though the provisions entered into force after (some) of the damages occurred. What is relevant is that interest is sought for a time after the provisions' entering into force.
- (AU.58) Should the statutory interest not cover the damages that the claimant actually incurred, then this can be claimed as positive damages under § 1293 ABGB.
- (AU.59) Tables 6 and 7 were calculated based on the effective interest method<sup>171</sup> and the formula

$$Z = \frac{K * p * t}{100 * t_{\text{yea}}}$$

where

Z...	Zinsen (interest)
K...	Kapital (principal amount of capital)
p...	Zinssatz (interest rate)
t...	number of days for which interest is due
t <sub>year</sub> ...	number of days that year

The calculations were also checked using the commercial website <http://www.basiszins.at/>, which delivered very accurate results.

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<sup>171</sup> This, it would seem, is also used by Austria's Supreme Court, as is apparent when recalculating the interest that the court awarded in case 8 Ob 548/87.

Table 6 – Interest for each single damage of 100

From	To	Total days	Days in a year	Damages	Commercial statutory interest rate	General statutory interest rate	Commercial interest payable (A & B)	General interest payable (C)
01.12.2010	31.12.2010	31	365	100.00	8.38%	4%	0.71	0.34
01.01.2011	30.06.2011	181	365	100.00	8.38%	4%	4.16	1.98
01.07.2011	31.12.2011	184	365	100.00	8.38%	4%	4.22	2.02
01.01.2012	30.06.2012	182	366	100.00	8.38%	4%	4.17	1.99
01.07.2012	31.12.2012	184	366	100.00	8.38%	4%	4.21	2.01
01.01.2013	30.06.2013	181	365	100.00	8.38%	4%	4.16	1.98
01.07.2013	31.12.2013	184	365	100.00	7.88%	4%	3.97	2.02
01.01.2014	11.02.2014	42	365	100.00	7.88%	4%	0.91	0.46
							26.51	12.80

Table 7 – Interest for the whole damage of 400

From	To	Total days	Days in a year	Damages	Commercial statutory interest rate	General statutory interest rate	Commercial interest payable (A & B)	General interest payable (C)
01.12.2010	31.12.2010	31	365	400.00	8.38%	4%	2.85	1.36
01.01.2011	30.06.2011	181	365	400.00	8.38%	4%	16.62	7.93
01.07.2011	31.12.2011	184	365	400.00	8.38%	4%	16.90	8.07
01.01.2012	30.06.2012	182	366	400.00	8.38%	4%	16.67	7.96
01.07.2012	31.12.2012	184	366	400.00	8.38%	4%	16.85	8.04
01.01.2013	30.06.2013	181	365	400.00	8.38%	4%	16.62	7.93
01.07.2013	31.12.2013	184	365	400.00	7.88%	4%	15.89	8.07
01.01.2014	11.02.2014	42	365	400.00	7.88%	4%	3.63	1.84
							106.03	51.20

(AU.60) As a result, the claimant could claim interest amounting to 106.03 in addition to the principal amount of 400, therefore a total of 506.03, from either A or B, as they were its contractual partners. From C, the claimant could only recover interest amounting to 51.20 in addition to the principal amount of 400, therefore a total of 451.20, reflecting the lack of a contractual relationship with that party. It is therefore more advantageous for the claimant to try to recover damages and interest from its contractual partners.

(AU.61) It should be noted once again that the calculation would look entirely different for competition law infringements committed since the entering into force of § 37a KartG on 1 March 2013, as interest relating to damages for such infringements would start to accrue from the day of the harm. In addition, the statutory commercial interest rate was increased to 9.2% above the base rate for contracts entered into on or after 16 March 2013.

### Section III. Procedural Aspects

#### 3.1. What are the procedures for the party seeking to receive interest on the damages paid? (e.g. does the claimant have to make a separate plea for the interest payments and if so, what information and evidence must be supplied? Does the judge award interest *ex officio* or does the claimant have to request it?).

(AU.62) In order to be awarded interest, the claimant has to request it under § 405 ZPO, as the principle of *ne ultra petita* expressly applies to interest. As the Austrian Supreme Court has held, however, a request for interest may not only be contained in the form of order sought, but may also follow from the factual submissions the claimant makes, eg the calculation of the debt the defendant owes the claimant.<sup>172</sup>

(AU.63) If statutory interest is sought, no additional information or evidence needs to be supplied. In order to seek commercial statutory interest, however, the claimant must submit that it entered into contractual relations with the defendant.

(AU.64) Under § 37a para 1 KartG, one could argue that the provision's wording ('The company must pay interest for the damages claim from the occurrence of the damage; § 1333 ABGB applies *mutatis mutandis*.') would allow judges who are awarding damages to a party harmed by a competition law infringement to also award interest to a party who has not explicitly requested it. However, against the background of general principles of Austrian civil law, it is unlikely that this interpretation will be adopted by the courts.

#### 3.2. Can the judge award a higher interest amount than requested by the claimant or does the principle of *ne ultra petita* apply?

(AU.65) The judge is bound by the principle of *ne ultra petita* (§ 405 ZPO) and can therefore not award more than the claimant has requested.

#### 3.3. Can the judge estimate interest or does interest always have to be calculated?

(AU.66) Under § 273 ZPO, judges are entitled to estimate the amount of damages where it is very difficult and disproportionate to meticulously calculate those damages. As this rule might be particularly useful in competition law cases as regards the calculation of damages, § 37a para 1 third sentence KartG explicitly reminds judges of this possibility. However, the interest will nevertheless have to be calculated based on the amount of damages awarded.<sup>173</sup>

#### 3.4. If the claimant changes the request regarding the interest, is this regarded as an amendment of the pleadings? Is this only possible until a certain stage into the proceedings and precluded later on or can the claimant make such changes without negative procedural consequences at any time up to the judgment?

(AU.67) § 235 ZPO contains rules regarding the amendment of claims. Until the case has become pendent, and therefore up until the point in time when the defendant has been served the claim (*Streitanhängigkeit*; § 232 para 1 ZPO), the claimant can always modify his requests (§ 235

<sup>172</sup> On this, see Austrian Supreme Court, case 1 Ob 239/99z.

<sup>173</sup> For a case in which the advantage gained through a law infringement was estimated based on § 273 ZPO, but the interest was nevertheless calculated, see Austrian Supreme Court, case 1 Ob 307/01f.

para 1 ZPO). Thereafter, the claimant may at any point in time limit the principal amount of damages or the accessory amount of interest requested (§ 235 para 4 ZPO).

- (AU.68) In order to increase the principal or accessory amount requested after a case has become pendent, the claimant requires the consent of either the defendant (§ 235 para 2 ZPO) or the court (§ 235 para 3 ZPO). According to settled case law, courts should – in the interest of procedural economy – generally allow changes of the claims.<sup>174</sup> In a case from 1960, for instance, the Supreme Court held that a request for the payment of interest could be made even after an interim judgment had found that the principal claim was lawful.<sup>175</sup>

#### *Section IV. Specific Instances*

##### **4.1. Identify any cases relating to damages claims for infringements of competition law and explain how interest was calculated. In writing these summaries, provide all relevant information about how interest and other compensation for the effluxion of time was calculated.**

- (AU.69) In Austria, only the Supreme Court publishes all of its judgments; lower courts may do so but rarely make use of that possibility. Therefore, no cases in which a court specifically ruled on the interest for damages for competition law infringements could be identified from the official Austrian case law database.<sup>176</sup> In any event, there are only very few cases in Austria in which damages for competition law infringements were actually awarded.
- (AU.70) One case that could be identified was the first ever Austrian case on damages for competition law infringement in the driving school cartel case, decided by the District Court of Graz on 16 March 2007 and confirmed by the Regional Court of Graz on 17 August 2007. In that case, the District Court awarded damages amounting to €174.40 and interest of 4% starting from 22 July 2004 to the claimant.<sup>177</sup> Following a decision of the Cartel Court imposing a fine of €75,000 on driving schools from Graz in October 2005,<sup>178</sup> customers assigned their claims to the Austrian Federal Chamber of Labour (*Bundesarbeiterkammer* or BAK) which then lodged this test case. From the summary of the case, it is apparent that the cartelized price was only charged for the duration of two months starting in May 2004. The BAK lodged its claim in June 2006. Unless the harmed parties had previously requested payment from the driving school – which is unlikely given that the cartel was only uncovered at a later point in time – the statutory interest of 4% pa should therefore have been awarded starting from the pendency of the claim, ie sometime in June 2006. There is a possibility, however, that the defendant did not object to the interest that the claimant had requested.

<sup>174</sup> Klicka in Fasching/Konecny, *Zivilprozessgesetze* (2nd edn, 30 April 2004, rdb.at) § 235 ZPO para 38 (with numerous references to the case law). For a case of the Austrian Supreme Court holding that the same reasoning as under § 264 German ZPO must apply under § 235 para 3 ZPO, see 1 Ob 822/51.

<sup>175</sup> See RS0039485 and Austrian Supreme Court, case 2 Ob 430/60 (published in *Juristische Blätter* 1961, 426).

<sup>176</sup> A search for case law was conducted on ris.bka.gv.at with a number of different search terms, eg “§ 37a KartG” (no results) and “Zins\* Kartell\* Schadenersatz\*” (28 results, none of which relevant). I also consulted with two judges of the Austrian Supreme Court in order to find some judgments in this respect; unfortunately in vain.

<sup>177</sup> Ginner, ‘Erstes österreichisches Urteil zum Private Enforcement – Fahrschulkartell Graz’, *Österreichische Zeitschrift für Kartellrecht* 2008, 110 (referring to cases BG Graz-Ost, 4 C 463/06h; LG Graz, 17 R 91/07p; both judgments not published).

<sup>178</sup> Austrian Cartel Court, 25 Kt 34, 253, 36, 42, 249, 250, 30, 32, 29, 35, 251, 252/05 (not published, referred to in *ibid*).

(AU.71) A widely known case on damages for a cartel is the elevator cartel case, which led to the Austrian Supreme Court sending a reference for a preliminary ruling on umbrella claims to the European Court of Justice (*Kone*, case C-557/12).<sup>179</sup> However, when issuing its final decision in the case the Supreme Court did not refer to the interest rate in question.<sup>180</sup> As it was a damages claim from the Austrian Federal Railways against members of the elevator cartel with whom it had *no* contractual relationships, one must assume that only an interest rate of 4% could have been awarded.

**4.2. Are the rules on the award of interest specific to the kinds of claim or general principles? Are there any specific approaches/rules that you can identify in national or EU competition cases, or in other cases where the claim is brought by business against business (B2B) and are there any specific approaches/rules in business versus consumer (B2C) cases?**

(AU.72) In Austria, rules regarding the award of interest are general principles under civil law, although they have now been modified for competition law under § 37a KartG. Only in B2B cases can the higher commercial interest rate be claimed – and only if the parties had a prior contractual relationship that allows the court to qualify the damages as contractual damages.

***Section V. Evaluation, Interpretation in conformity with EU Law, and Intertemporal Aspect***

**5.1. Throughout the reports, evaluate how satisfactory are the rules on the calculation of interest perceived to be? In considering this question, identify any law reform proposals in the last 15 years or so, or any major judgments by the higher courts that call into question or change some of the issues pertaining to the award of damages. Please identify changes of relevant national law on interest that will come into force or are currently considered.**

(AU.73) By introducing a provision on default interest into competition law which breaks with the established principles of general Austrian civil law in March 2013, the Austrian legislator has sought to provide victims of competition law infringements with full compensation as requested by the Court of Justice of the European Union. In addition to default interest, victims of competition law infringements whose harm from delayed payment is higher than the statutory interest rate – or whose damages result from a competition law infringement committed before 1 March 2013 – can also bring a claim for positive damages regarding this amount. It would seem that this guarantees full compensation in the terms of the CJEU.

(AU.74) Following the entering into force of Directive 2014/104/EU, the Austrian government is planning a competition law reform which was to be announced before the end of 2015;<sup>181</sup> so far, no such announcement has been made.

**5.2. For each question, where it is relevant, assess the compliance of the national interest rules with the minimum standard prescribed by EU law ('full compensation'). If national law does not grant full compensation, please try to identify an interpretation of national law that guarantees full compensation in conformity with European law.**

<sup>179</sup> CJEU, case C-557/12, *Kone and others v ÖBB*, ECLI:EU:C:2014:1317.

<sup>180</sup> Austrian Supreme Court, case 7 Ob 121/14s.

<sup>181</sup> Mitterlehner, 'Beantwortung der schriftlichen parlamentarischen Anfrage Nr. 3919/J' (24 April 2015) 11 f <[http://www.parlament.gv.at/PAKT/VHG/XXV/AB/AB\\_03755/imfname\\_403814.pdf](http://www.parlament.gv.at/PAKT/VHG/XXV/AB/AB_03755/imfname_403814.pdf)> accessed 29 October 2015.

(AU.75) Overall, parts of Austrian literature are very critical of many aspects in the Austrian provisions enabling the private enforcement of competition law.<sup>182</sup> This criticism, however, does not extend to the damages that can be awarded under Austrian law. After all, full compensation (*volle Genugtuung*) for parties on which other parties have intentionally inflicted harm is a principle which is well established under general Austrian civil law.<sup>183</sup> Under § 37a KartG, it would seem that full compensation – including interest – for victims of competition law infringements is now a principle expressly incorporated into Austrian competition law, as well.

(AU.76) For infringements predating the entering into force of § 37a KartG on 1 March 2013, victims of competition law infringements can resort to claims of positive damages (including interest) that they incurred due to the competition law infringement (§ 1293 ABGB), provided they can adduce proof of harm. This ensures that they obtain full compensation, including interest..

**5.3. Finally, when assessing the overall compliance of national law with the principle of full compensation based on directly applicable EU law, please confirm that national courts have to apply it also in relation to past infringements of EU competition law or the equivalent provisions of the EEA agreement (e.g. cartels starting in the 1990ies and ending in the 2000er years).**

(AU.77) § 37a KartG, which states that interest must be paid from the moment harm arises from a competition law infringement, only applies to infringements of EU or Austrian competition law committed on or after 1 March 2013. It does not apply retroactively.

(AU.78) For past infringements, the law as it stood at the time for which interest is requested is decisive, ie based on general civil law provisions interest could only be claimed from the day following the day on which the damages payment became due (in commercial relations until 31 July 2002: from the day on which the damages payment became due). A damages payment becomes due on the day the claimant specifies or quantifies the damages, for instance through a request for payment or the bringing of a claim in court. However, as stated above, victims of competition law infringements can always resort to claiming interest as actual damages that they incurred due to the infringement (§ 1293 ABGB), provided they can adduce proof of such harm.

**5.4. Regarding the secondary subject of investigation (interest on damages due to infringements of national competition law only) Recital 12 of the preamble of Directive 2014/104/EU summarises the EU law principles regarding interest as follows:**

**“Anyone who has suffered harm caused by an infringement can claim compensation for the actual loss (*damnum emergens*), for the gain of which he has been deprived (loss of profit or *lucrum cessans*) plus interest. This is irrespective of whether the national rules define these categories separately or in combination. The payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time, and it should be due from the time the harm occurred until compensation is paid, without prejudice to the qualification of such interest as compensatory or default interest under national law. This is also without prejudice to whether effluxion of time is taken into account as a separate category (interest) or as a**

<sup>182</sup> See, for instance, Csoklich, ‘Schadenersatz nach Kartellverstoß’, VbR 2014, 185.

<sup>183</sup> See Hinteregger in Kletečka/Schauer (eds), *ABGB-ON*<sup>1.02</sup> (1 June 2014, rdb.at) §§ 1323, 1324 ABGB (‘volle Genugtuung’); see also § 1333 para 3 ABGB.

**constituent part of actual loss of profit. It is incumbent on the Member States to lay down the rules to be applied for that purpose”.**

**Would the right to full compensation as set out by Recital 12 of the directive apply to interest calculation for damages in cases where only national competition law has been infringed and the damage occurred before the implementation of the directive came into force?**

- (AU.79) The current Austrian provisions foresee default interest (*Verzugszinsen*) for damages due for competition law infringements from the time the harm occurred until compensation is paid. In this respect, therefore, they already comply with full compensation as envisaged by the Directive. In addition, the Austrian provisions do not distinguish between an infringement of Austrian or EU competition law. In both cases, § 37a para 1 KartG applies if the infringement occurred on or after 1 March 2013.
- (AU.80) Art 21 para 1 Directive 2014/104/EU<sup>184</sup> states that this Directive must be implemented by 27 December 2016. Art 22 para 1 of that Directive further states that Member States shall ensure that the national transposition measures relating to the Directive’s substantive provisions ‘do not apply retroactively.’ § 86 para 4 KartG foresees such a provision regarding the application of § 37a KartG.

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<sup>184</sup> Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 2014/349, 1.

**Section VI. Applicable legal provisions and their English translation<sup>185</sup>**

**Handelsgesetzbuch (HGB; Commercial Code)**

provisions in force: 1 March 1939 until 31 July 2002

§ 352. (1) Die Höhe der gesetzlichen Zinsen, mit Einschluß der Verzugszinsen, ist bei beiderseitigen Handelsgeschäften fünf vom Hundert für das Jahr. Das Gleiche gilt, wenn für eine Schuld aus einem solchen Handelsgeschäfte Zinsen ohne Bestimmung des Zinsfußes versprochen sind.

(2) Ist in diesem Gesetzbuche die Verpflichtung zur Zahlung von Zinsen ohne Bestimmung der Höhe ausgesprochen, so sind darunter Zinsen zu fünf vom Hundert für das Jahr zu verstehen.

§ 353. Kaufleute unter einander sind berechtigt, für ihre Forderungen aus beiderseitigen Handelsgeschäften vom Tage der Fälligkeit an Zinsen zu fordern. Zinsen von Zinsen können auf Grund dieser Vorschrift nicht gefordert werden.

§ 352. (1) The amount of statutory interest, including default interest, in mutual commercial transactions amounts to five per cent per annum. The same is true when interest is promised for a debt arising out of such commercial transactions without determining the rate of interest.

(2) Where the present Code refers to the obligation to pay interest without determining the amount, then an interest rate of five per cent per annum applies.

§ 353. Merchants amongst one another are entitled to ask for interest arising out of mutual commercial transactions starting from the date on which a payment becomes due. Interest from interest cannot be claimed on the basis of that provision.

**Gesetz vom 14. Juni 1868, Gesetz 62/1868 (Law of 14 June 1868, Law 62/1868)**

provisions in force: 1 March 1939 until 31 July 2002

§ 2. An Zinsen, die ohne bestimmtes Maß bedungen worden sind oder aus dem Gesetze gebühren, sind vier vom Hunder auf ein Jahr zu entrichten, wenn nicht für bestimmte Fälle besondere Zinssätze festgelegt sind.

§ 3. Zinsen von Zinsen dürfen gefordert werden:  
a) wenn solche ausdrücklich bedungen wurden;  
b) wenn fällige Zinsen eingeklagt werden, von diesen vom Tage der Klagsbehändigung an. Ueber die Höhe der Zinseszinsen entscheidet zunächst die Verabredung; wurde aber hierüber nichts bedungen, so gelten die gesetzlichen Zinsen. (§ 2.)

§ 2. Where interest has been agreed on without setting a rate or is due by default, the interest rate amounts to four per cent per annum, unless a special statutory interest rate applies.

§ 3. Interest from interest may be requested:  
a) if such has expressly been agreed on;  
b) if interest due is being claimed in court, from the day that the claim is served.  
The agreement decides on the applicable rate of the compound interest; where no such agreement has been made, the statutory interest rate applies. (§ 2)

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<sup>185</sup> To search for Austrian laws as they applied on certain dates, see <https://www.ris.bka.gv.at/Bundesrecht/>.



### **Allgemeines bürgerliches Gesetzbuch (ABGB; Civil Code)**

provision in force: 1 January 1812 until 31 July 2002

§ 1333. Der Schade, welchen der Schuldner seinem Gläubiger durch Verzögerung der bedungenen Zahlung des schuldigen Capitals zugefügt hat, wird durch die von dem Gesetze bestimmten Zinsen vergütet (§ 995).

§ 1333. The damage which the debtor has inflicted on his creditor by delaying the payment of a capital due is compensated by the payment of interest as specified by the law (§ 995). [remark: § 995 ABGB was replaced by § 2 Law of 14 June 1868)

### **Handelsgesetzbuch (HGB; Commercial Code)**

provisions in force: 1 August 2002 until 31 December 2006

§ 352. Ist in diesem Gesetzbuch die Verpflichtung zur Zahlung von Zinsen ausgesprochen, so findet auf ihre Höhe, sofern nicht Besonderes festgesetzt ist, der gesetzliche Zinssatz nach den Bestimmungen des ABGB Anwendung.

§ 352. Where the present Code refers to the obligation to pay interest without determining its amount, the statutory interest rate under the ABGB applies.

§ 353. repealed

§ 353. repealed

### **Allgemeines bürgerliches Gesetzbuch (ABGB; Civil Code)**

provision in force: 1 August 2002 until 31 December 2006

#### **Gesetzliche Zinsen und weitere Schäden**

#### **Statutory interest and other damages**

§ 1333. (1) Der Schaden, den der Schuldner seinem Gläubiger durch die Verzögerung der Zahlung einer Geldforderung zugefügt hat, wird durch die gesetzlichen Zinsen (§ 1000 Abs.1) vergütet.

§ 1333. (1) The damage which the debtor has inflicted on his creditor by delaying the payment of a monetary claim is compensated by the payment of statutory interest (§ 1000 para 1).

(2) Bei der Verzögerung der Zahlung von Geldforderungen zwischen Unternehmern aus unternehmerischen Geschäften beträgt der gesetzliche Zinssatz acht Prozentpunkte über dem Basiszinssatz. Dabei ist der Basiszinssatz, der am letzten Kalendertag eines Halbjahres gilt, für das nächste Halbjahr maßgebend.

(2) If the payment of a monetary claim arising from commercial transactions is delayed between entrepreneurs, the statutory interest rate amounts to eight percentage points above the base rate. The base rate applicable on the last calendar day of a half-year is relevant for the next half-year.

(3) Der Gläubiger kann außer den gesetzlichen Zinsen auch den Ersatz anderer, vom Schuldner verschuldeter und ihm erwachsener Schäden geltend machen, insbesondere die notwendigen Kosten zweckentsprechender außergerichtlicher Betreibungs- oder Einbringungsmaßnahmen, soweit diese in einem angemessenen Verhältnis zur betriebenen Forderung stehen.

(3) Apart from statutory interest, the creditor may also request the compensation of other damages that the debtor has caused him, in particular the necessary costs for extrajudicial collection measures as far as these are proportionate to the claim pursued.

## Allgemeines bürgerliches Gesetzbuch (ABGB; Civil Code)

provision in force: since 1 August 2002<sup>105</sup>

### Zinsen und Zinseszinsen

§ 1000. (1) An Zinsen, die ohne Bestimmung der Höhe vereinbart worden sind oder aus dem Gesetz gebühren, sind, sofern gesetzlich nicht anderes bestimmt ist, vier vom Hundert auf ein Jahr zu entrichten.

(2) Der Gläubiger einer Geldforderung kann Zinsen von Zinsen verlangen, wenn die Parteien dies ausdrücklich vereinbart haben. Sonst kann er, sofern fällige Zinsen eingeklagt werden, Zinseszinsen vom Tag der Streitanhängigkeit an fordern. Wurde über die Höhe der Zinseszinsen keine Vereinbarung getroffen, so sind ebenfalls vier vom Hundert auf ein Jahr zu entrichten.

(3) Haben die Parteien über die Frist zur Zahlung der Zinsen keine Vereinbarung getroffen, so sind diese bei der Zurückzahlung des Kapitals oder, sofern der Vertrag auf mehrere Jahre abgeschlossen worden ist, jährlich zu zahlen.

§ 1334. Eine Verzögerung fällt einem Schuldner zur Last, wenn er den durch Gesetz oder Vertrag bestimmten Zahlungstag nicht einhält. Sofern die Parteien nicht anderes vereinbart haben, hat der Schuldner seine Leistung [...], wenn die Forderung der Höhe nach noch nicht feststeht, nach dem Eingang der Rechnung oder einer gleichwertigen Zahlungsaufforderung zu erbringen. Ist die Zahlungszeit sonst nicht bestimmt, so trägt der Schuldner die Folgen der Zahlungsverzögerung, wenn er sich nach dem Tag der gerichtlichen oder außergerichtlichen Einmahnung nicht mit dem Gläubiger abgefunden hat.

### Interest and compound interest

§ 1000. (1) Where interest has been agreed on without setting a rate or is due by default, the interest rate amounts to four per cent per annum, unless a special statutory interest rate applies.

(2) The creditor of a monetary claim can demand compound interest if the parties have expressly agreed on this. Otherwise, the creditor, when requesting interest due in court, may demand compound interest from the day of the claim's pendency onwards. Where no agreement as to the applicable compound interest rate has been made, this rate is set at four per cent per annum.

(3) If the parties have not agreed on the time limit within which the interest must be paid, then the interest is due when the capital is repayed or, where a contract has been concluded for several years, annually.

§ 1334. A debtor is responsible for a delay where he does not comply with a payment date set by the law or by a contract. Unless the parties have agreed otherwise, the debtor has to perform his duty [...], where the amount of the claim is not yet determined, upon receipt of the invoice or a similar request for payment. If the payment period is not determined otherwise, the debtor bears the consequences of a delayed payment if he does not come to terms with the creditor on the day following the reminder in or out of court.

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<sup>105</sup> A minor amendment introduced the heading in 2010; see BGBl I 28/2010.

**Allgemeines bürgerliches Gesetzbuch (ABGB; Civil Code)**

provision in force: since 1 January 1812

Schade.

§ 1293. Schade heißt jeder Nachtheil, welcher jemanden an Vermögen, Rechten oder seiner Person zugefügt worden ist. Davon unterscheidet sich der Entgang des Gewinnes, den jemand nach dem gewöhnlichen Laufe der Dinge zu erwarten hat.

Damage.

§ 1293. A damage is any disadvantage which has been inflicted on someone's assets, rights or his person. Different from this are lost profits, which someone can expect in the ordinary course of things

**Unternehmensgesetzbuch (UGB; Commercial Code)**

provision in force: 1 January 2007 until 15 March 2013; continues to apply to commercial contracts entered into before 16 March 2013

§ 352. Bei der Verzögerung der Zahlung von Geldforderungen zwischen Unternehmern aus unternehmensbezogenen Geschäften beträgt der gesetzliche Zinssatz acht Prozentpunkte über dem Basiszinssatz. Dabei ist der Basiszinssatz, der am letzten Kalendertag eines Halbjahres gilt, für das nächste Halbjahr maßgebend.

§ 352. Where the payment of a monetary claim arising from commercial transactions between entrepreneurs is delayed, the statutory interest rate is set at eight percentage points above the base rate. The base rate applicable on the last calendar day of a half-year is relevant for the next half-year.

**Unternehmensgesetzbuch (UGB; Commercial Code)**

provision in force: since 1 January 2007

§ 353. § 1335 ABGB ist auf Geldforderungen gegen einen Unternehmer nicht anzuwenden.

§ 353. § 1335 ABGB is not applicable to monetary claims against an entrepreneur.

**Allgemeines bürgerliches Gesetzbuch (ABGB; Civil Code)**

provision in force: since 1 January 2007

**Gesetzliche Zinsen und weitere Schäden**

§ 1333. (1) Der Schaden, den der Schuldner seinem Gläubiger durch die Verzögerung der Zahlung einer Geldforderung zugefügt hat, wird durch die gesetzlichen Zinsen (§ 1000 Abs. 1) vergütet.

(2) Der Gläubiger kann außer den gesetzlichen Zinsen auch den Ersatz anderer, vom Schuldner verschuldeter und ihm erwachsener Schäden geltend machen, insbesondere die notwendigen Kosten zweckentsprechender außergerichtlicher Betreibungs- oder Einbringungsmaßnahmen, soweit diese in einem angemessenen Verhältnis zur betriebenen Forderung stehen.

**Statutory interest and other damages**

§ 1333. (1) The damage which the debtor has inflicted on his creditor by delaying the payment of a monetary claim is compensated by the payment of statutory interest (§ 1000 para 1).

(2) Apart from statutory interest, the creditor may also request the compensation of other damages that the debtor has caused him, in particular the necessary costs for extrajudicial recovery or collection measures as far as these are proportionate to the claim pursued.

**Unternehmensgesetzbuch (UGB; Commercial Code)**

provision in force: since 16 March 2013

§ 455. Dieser Abschnitt gilt für Rechtsgeschäfte zwischen Unternehmern sowie für Rechtsgeschäfte zwischen einem Unternehmer und einer juristischen Person des öffentlichen Rechts.

§ 455. This section applies to legal transactions between entrepreneurs as well as legal transactions between an entrepreneur and a legal person governed by public law.

§ 456. Bei der Verzögerung der Zahlung von Geldforderungen beträgt der gesetzliche Zinssatz 9,2 Prozentpunkte über dem Basiszinssatz. Dabei ist der Basiszinssatz, der am ersten Kalendertag eines Halbjahres gilt, für das jeweilige Halbjahr maßgebend. Soweit der Schuldner für die Verzögerung aber nicht verantwortlich ist, hat er nur die in § 1000 Abs. 1 ABGB bestimmten Zinsen zu entrichten.

§ 456. Where the payment of a monetary claim is delayed, the statutory interest rate is set at 9.2 percentage points above the base rate. The base rate applicable on the first calendar day of a half-year is relevant for the respective half-year. Where a debtor is not responsible for the delay, he only has to pay the interest set in § 1000 para 1 ABGB.

## **Kartellgesetz 2005 (KartG; Cartel Act)**

provision in force: since 1 March 2013

### Schadenersatz wegen Wettbewerbsverstößen

§ 37a. (1) Wer schuldhaft eine Rechtsverletzung nach § 29 Z 1 begeht, ist zum Ersatz des daraus entstandenen Schadens verpflichtet. Wird eine Ware oder Dienstleistung zu einem überhöhten Preis bezogen, so ist der Schadenersatzanspruch nicht deshalb ausgeschlossen, weil die Ware oder Dienstleistung weiterveräußert wurde. Bei der Entscheidung über den Umfang des Schadens nach § 273 ZPO kann insbesondere der Vorteil, den das Unternehmen durch den Verstoß erlangt hat, berücksichtigt werden. Die Schadenersatzforderung hat das Unternehmen ab Eintritt des Schadens in sinngemäßer Anwendung des § 1333 ABGB zu verzinsen.

(2) Ein Rechtsstreit über eine Forderung nach Abs. 1 kann bis zur Erledigung eines Verfahrens des Kartellgerichts, der Kommission der Europäischen Union oder einer Wettbewerbsbehörde im Sinn der Verordnung (EG) Nr. 1/2003 über den Verstoß unterbrochen werden.

(3) Ein Zivilgericht ist an eine in einer rechtskräftigen Entscheidung des Kartellgerichts, der Kommission der Europäischen Union oder einer Wettbewerbsbehörde im Sinn der Verordnung (EG) Nr. 1/2003 getroffene Feststellung, dass ein Unternehmen die in der Entscheidung angeführte Rechtsverletzung rechtswidrig und schuldhaft begangen hat, gebunden.

(4) Die Verjährung eines Schadenersatzanspruchs nach Abs. 1 wird für die Dauer eines auf eine Entscheidung im Sinn des Abs. 3 gerichteten Verfahrens gehemmt. Die Hemmung endet sechs Monate nach der rechtskräftigen Entscheidung oder anderweitigen Beendigung des eingeleiteten Verfahrens.

### Damages for competition infringements

§ 37a. (1) Whoever culpably commits an infringement pursuant to § 29 Z 1 is obliged to compensate the resulting damage. If a good or service is obtained at an inflated price, the claim for damages is not excluded because the good or service was resold. When deciding on the extent of the damage according to § 273 ZPO, the benefit that the company has obtained through the infringement may be taken into account. The company must pay interest for the damages claim from the occurrence of the damage; § 1333 ABGB applies mutatis mutandis.

(2) A lawsuit relating to a claim under para 1 can be interrupted until infringement proceedings before the Cartel Court, the European Commission or a competition authority within the meaning of Regulation (EC) no 1/2003 have been resolved.

(3) A civil court is bound by findings in a final decision of the Cartel Court, the European Commission or a competition authority within the meaning of Regulation (EC) no

1/2003 that hold that a company has unlawfully and culpably committed the infringement.

(4) The limitation period of a damages claim pursuant to para 1 shall be suspended for the duration of proceedings leading to a decision within the meaning of para 3. The suspension ends six months after the final decision is taken or after such proceedings have otherwise ended.

## Belgium

Caroline Cauffman<sup>186</sup>

### *Preliminary Matters*

(BE.1) Actions for damages resulting from the infringement of the competition rules will generally be of a non-contractual nature. This is undoubtedly true where there is no contractual bond between the parties.

Where there is a contractual relationship between the parties the situation becomes a bit more complicated since Belgian law does not allow the cumulation of contractual and non-contractual actions. More specifically, a non-contractual action will only be available between contracting parties if the fault is not purely contractual and if the damage is not contractual.<sup>187</sup>

A typical private enforcement case consists of one party agreeing cartelised prices with competitors and then concluding a contract with a downstream party applying the agreed prices. In such a case, the fault is not an infringement of a contractual duty, but only of a legal provision (Art. 101 TFEU and/or the national equivalent) and of the precontractual duty to negotiate and conclude contracts in good faith. The damage resulting from the overcharge, does not follow from the non-performance of an obligation arising out of the contract, and therefore seems to be non-contractual. This is all the more so, since the infringement of Art. 101 TFEU and/or its national equivalent will render the agreement or the cartelised price provision void, at least to the extent of the overcharge. Therefore, the action for damages will be of a non-contractual nature.

Exceptionally, however, the infringement of competition rules may at the same time be a contractual non-performance, for example in the case of a refusal to supply contrary to Art. 102 or its national equivalent in the presence of a framework agreement that renders supply obligatory<sup>188</sup> or in the case of a non-payment of deliveries by a dominant undertaking with the aim of driving the supplier out of the market. In these cases the damage too seems to be contractual and only contractual actions (as opposed to non-contractual actions) will be available. However, insofar as the Belgian rules on contractual liability would lead to a lower protection of the party to whom damage is caused than guaranteed by EU law, the less protective Belgian rules will need to be set aside (cf infra n° 56).

### *Section I. General Principles*

#### **1.1. What is interest? Is there a definition?**

(BE.2) Belgian law distinguishes between several types of interest. The main distinction is between **remuneratory interest** and **interest for late performance**.<sup>189</sup>

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<sup>187</sup> Cass. 29 September 2006, NJW 153, 946, note and RABG 2007/19, 1256.

<sup>188</sup> X. Taton, T. Franchoo, N. Baeten and I. Rooms, “Chronique de jurisprudence (2004-2010). 1ère partie – Overzicht van rechtspraak (2004-2010). 1ste deel. Les actions civiles pour infraction au droit de la concurrence – Private handhaving van het mededingingsrecht”, TBH 2013, n° 61, p. 29.

<sup>189</sup> W. Van Gerven and S. Covemaeker, *Verbintenissenrecht*, Leuven, Acco, 2006, 600.

**Remuneratoy interest** is determined by contract as a form of remuneration for the loan of money.<sup>190</sup> This type of interest is not relevant for this study and will not be dealt with any further.

**Interest as a compensation for late payment** can either be moratory or compensatory.<sup>191</sup>

**Moratory interest** is due in case of late payment of monetary debts (*Geldschulden/dettes de somme*). **Compensatory interest** is due in case of delay in the performance of debts of value (*waardeschulden/dettes de valeur*).<sup>192</sup>

The distinction between monetary debts and debts of value is further explained in n° 5 et seq.

- (BE.3) In addition, the notions of **contractual or conventional interest** and **judicial interest** are used.

**Contractual or conventional interest** are those determined by contract. They may be either remuneratory, moratory or compensatory.<sup>193</sup>

The concept **judicial interest** is disputed. According to a first opinion it refers to the interest which accrues as of the moment of the judicial decision on the sums the loser has to pay. Since it is interest due on a sum of money it is a type of moratory interest.<sup>194</sup> According to a second opinion, judicial interest is that which the judge awards; it can be moratory or compensatory.<sup>195</sup> In a recent decision, the Supreme court specified that judicial interest is the moratory or compensatory interest the Court awards as of the moment of the start of the proceedings until payment of the main debt.<sup>196</sup>

- (BE.4) Art. 1153 Civil code provides that in the case of obligations relating to the payment of a specific sum of money, compensation for delay in performance can never be anything else other than **legal interest**, unless the law provides otherwise or in case of fraud on the side of the debtor. In fact this Article deals with moratory interest.<sup>197</sup> The concept of legal interest itself refers to the legal interest rate which means that legal interest is moratory interest at the legal interest rate.<sup>198</sup> On the determination of this rate, see infra n° 17-18.

<sup>190</sup> L. Kestemont, *Ockhams scheermes in het leerstuk van de Belgische nalatigheidsinteressen*, Brugge, die Keure, 2012, n° 51, p. 49; I. Samoy and M. Aguirre, "De raakvlakken tussen de contractuele en de buitencontractuele aansprakelijkheid. Schadeherstel, schadevergoeding en intresten" in S. Stijns and P. Wery, *De raakvlakken tussen de contractuele en de buitencontractuele aansprakelijkheid*, Brugge, Die Keure, 2010, n° 10-11, p. 101-102; W. Van Gerven and S. Covemaeker, 600. See extensively: C. Biquet-Mathieu, *Le sort des intérêts dans le droit du credit. Actualité ou desuétude du Code civil?*, Liège, Collection Scientifique de la Faculté de Droit de Liège, 1998, 803.

<sup>191</sup> L. Kestemont, n° 51, p. 50.

<sup>192</sup> Cass. 23 September 1986, *Arr. Cass.* 1986-87, 93; Cass. 25 January 1989, *Arr. Cass.* 1988-89, 629; Mons 11 March 1994, *JLMB* 1994, 1294; W. Van Gerven and S. Covemaeker, 600-601. The distinction between moratory and compensatory interest has been criticized in scholarly literature, see B. De Temmerman, "Interest bij schadevergoeding uit wanprestatie en onrechtmatige daad. Een stand van zaken, tevens aanleiding tot een kritische beschouwing over de grondslagen van het Belgische schadevergoedingsrecht", *TPR* 1999, 1277-1441.

<sup>193</sup> Comp. I. Samoy and M. Aguirre, n° 18, p. 104; W. Van Gerven and S. Covemaeker, 601; P. Van Ommeslaghe, *Droit des obligations*, II, *Sources des obligations (deuxième partie)*, Brussels, Bruylant, 2010, nr. 1148, p. 1641.

<sup>194</sup> A different concept of judicial interest is used for the purposes of certain rules of civil procedure, in particular Art. 557 Code of civil procedure (determination of the competent court) and Art. 617-618 Code of civil procedure (the availability of appeal). For the application of these provisions judicial interest refers to the interest due from the moment the claim is brought. See on this point B. De Temmerman, 1282-1283; W. Van Gerven and S. Covemaeker, 601.

<sup>195</sup> Cass. 4 Novembre 1985, *Pas.* 1986, I, 254; P. Van Ommeslaghe, II, nr. 1148, p. 1641. On the concept of judicial interest, see further I. Samoy and M. Aguirre, n° 22-23, p. 105-106 and 31-33, p. 109-110.

<sup>196</sup> Cass. 13 April 2015, [www.juridat.be](http://www.juridat.be).

<sup>197</sup> See e.g. A. Van Oevelen, n° 12, p. 162.

<sup>198</sup> Sometimes the concept of legal interest is also used to refer to interest which accrues without a notification of default, see I. Samoy and M. Aguirre, n° 30, p. 109.

However, Art. 1153 Civil code is not a mandatory provision and the parties can deviate from it by agreeing on a conventional interest rate. When the agreed interest rate manifestly exceeds the (potential) damage resulting from late payment, the Court may *ex officio* or at the debtor's request mitigate the conventional interest. There is some unclarity as to whether the standard that is to be used to determine whether the conventional interest is excessive is the actual damage suffered or the potential damage i.e. the damage that could reasonably be expected at the moment of the conclusion of the contract.<sup>199</sup>

## 1.2. When, and under what conditions, is interest payable at all? Does this depend on whether the claim is brought in tort, breach of contract or (where applicable) restitution/unjust enrichment?

(BE.5) **The type of the debt** determines the type of interest that is due in the case of late performance. A debt is a **monetary debt** (*dette de sommes, geldschuld*) if it:

- either consists as of its origin of an obligation to pay a sum of money which is determined numerically or can be determined numerically according to statutory rules (e.g. a sales price, but also the obligation of an insurance company arising from a liability insurance, this obligation exists as of its origin in an obligation to pay a sum of money although the amount will only be determined later<sup>200</sup>),<sup>201</sup>
- or serves to compensate damage resulting from an obligation other than to pay a sum of money, whose amount is numerically determined or determinable according to contractual or statutory rules (e.g. a penalty clause).<sup>202</sup>

A debt is a **debt of value** (*dette de valeur/waardeschuld*) if the precise amount of the debt is to be determined by the court or by the parties themselves (e.g. in the case of a settlement).<sup>203</sup> Compensatory obligations arising out of tort are debts of value.<sup>204</sup> As soon as the amount of the debt of value is determined by the court or by agreement between the parties, the debt of value turns into a monetary debt and the rules relating to monetary debts apply.<sup>205</sup>

(BE.6) If the debt is a **monetary debt, moratory interest** may be due. Unless the contract provides otherwise or in the cases determined by case law or statutory provisions (e.g. the specific rules on late payment in commercial transactions apply), moratory interest only accrues as of the moment of the notification of default (*mise en demeure/ingebrekestelling*) (Art. 1153 Civil code). This is a letter from the creditor to the debtor in which the creditor clearly and unequivocally writes insisting on performance.<sup>206</sup> The notification of default may be given before the debt is due, but it will only become effective once the debt is due.<sup>207</sup> The most important exception to the requirement of a notification of default for the field of antitrust damages is that when a debt of value turns into a monetary debt because its amount is

<sup>199</sup> I. Samoy and M. Aguirre, n° 65, p. 125.

<sup>200</sup> Cass. 27 October 1995, *Arr. Cass.* 1995, 927; A. Van Oevelen, 2009, n° 6, p. 158.

<sup>201</sup> L. Kestemont, n° 55, p. 55; I. Samoy and M. Aguirre, n° 14, p. 103; A. Van Oevelen, n° 6, p. 158.

<sup>202</sup> L. Kestemont, n° 55, p. 55; I. Samoy and M. Aguirre, n° 14, p. 103; A. Van Oevelen, 2009, n° 7, p. 159.

<sup>203</sup> I. Samoy and M. Aguirre, n° 14, p. 103-104. See also L. Kestemont, n° 55, p. 55.

<sup>204</sup> W. Van Gerven and S. Covemaeker, 461.

<sup>205</sup> Cass. 22 December 2006, *RW* 2006-07, 1439, note A. Van Oevelen; L. Kestemont, n° 57, p. 56; I. Samoy and M. Aguirre, n° 15, p. 104; A. Van Oevelen, n° 4, p. 156.

<sup>206</sup> L. Kestemont, n° 68, p. 62-63; S. Stijns, 158.

<sup>207</sup> Cass. 25 February 1993, *Arr. Cass.* 1993, 222; B. De Temmerman, 1999, 1277, nr. 48 et seq.; W. Van Gerven and S. Covemaeker, 193; L. Kestemont, n° 70, p. 64.



determined by the Court or by agreement between the parties, no separate notification of default is required. In such a case, the writ counts as a notification of default<sup>208</sup>

Moratory interest cannot accrue before the debt is due.<sup>209</sup>

Moratory interest is only due when the late payment is attributable to the debtor.<sup>210</sup>

The creditor only needs to prove late payment; he does not need to prove any loss.<sup>211</sup>

- (BE.7) If the debt is a **debt of value**, the Court may award **compensatory interest**. Compensatory interest forms part of the compensation due to the creditor. The Supreme Court held that the Courts may at their discretion, but within the limits of the written statements submitted by the parties, decide whether to award compensatory interest.<sup>212</sup> If they decide to award compensatory interest they are within the same boundaries free to determine the interest rate (so as to ensure full compensation)<sup>213</sup> and to determine on the moment as of which it accrues<sup>214</sup>. The Supreme Court will only exercise a marginal control.<sup>215</sup> No notification of default is required in cases of non-contractual liability. Art. 1153 Civil code does not apply to compensatory damages.<sup>216</sup>

### 1.3. Is payment of interest compulsory or at the discretion of the court?

- (BE.8) When moratory interest is rightfully claimed, the Court has to award it; the Court has no discretion. However, when the claimant would be abusing his right to claim moratory interest, the Court may mitigate the claim (cf infra n° 27).

- (BE.9) With regard to compensatory interest, see the previous question.

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<sup>209</sup> Cass. 16 February 1987, *Pas.* 1987, I, 716; Cass. 21 October 1991, *Pas.* 1992, I, 142; Cass. 7 March 1994, *Pas.* 1994, I, 230; Cass. 27 March 2000, *Pas.* 2000, I, 643; P. Van Ommeslaghe, II, nr. 1150, p. 1643.

<sup>209</sup> Cass. 16 February 1987, *Pas.* 1987, I, 716; Cass. 21 October 1991, *Pas.* 1992, I, 142; Cass. 7 March 1994, *Pas.* 1994, I, 230; Cass. 27 March 2000, *Pas.* 2000, I, 643; P. Van Ommeslaghe, II, nr. 1150, p. 1643.

<sup>210</sup> Cass. 17 October 2002, *Pas.* 2002, I, 1974; P. Van Ommeslaghe, II, nr. 1150, p. 1643.

<sup>211</sup> P. Van Ommeslaghe, II, n° 1150, p. 1645.

<sup>212</sup> Cass. 24 January 1980, *Arr. Cass.* 1979-80, 597, *Pas.* 1980, I, 586; Cass. 16 February 1983, *Pas.* 1983, I, 677; T. Vansweevelt and B. Weyts, n° 1057, p. 668.

<sup>213</sup> Cass. 24 January 1980, *Arr. Cass.* 1979-80, 597, *Pas.* 1980, I, 586; Cass. 20 February 2004, *Arr. Cass.* 2004, 282, *Pas.* 2004, I, 297; T. Vansweevelt and B. Weyts, n° 1057, p. 668.

<sup>214</sup> Cass. 24 January 1980, *Arr. Cass.* 1979-80, 597, *Pas.* 1980, I, 586; Cass. 16 February 1983, *Pas.* 1983, I, 677; T. Vansweevelt and B. Weyts, n° 1057, p. 668. Regarding the moment as of which compensatory interest accrues, see further infra n 23-24.

<sup>215</sup> P. Van Ommeslaghe, II, n° 1149, p. 1642.

<sup>216</sup> W. Van Gerven and S. Covemaeker, 609.

#### 1.4. What is said to be the purpose of the interest payment?

- (BE.10) The purpose of interest is in any case to compensate the creditor for being deprived of the use of a certain sum of money. The extent to which interest also serves to compensate for the depreciation of money is more obscure.
- (BE.11) Compensatory interest forms part of the compensation due to the creditor and serves to compensate additional damages arising from the delayed payment of a debt of value (cf. supra n° 1).<sup>217</sup> Occasionally, the Supreme Court has held that in addition compensatory interest serves to compensate damage resulting from the depreciation of money.<sup>218</sup> In other cases, it accepted however, compensation for the depreciation of money next to compensatory interest (at a lower than the legal interest rate).<sup>219</sup>
- (BE.12) It is disputed whether or not the legal interest rate covers the depreciation of money.<sup>220</sup> In any case, pursuant to Art. 1153 Civil code no additional compensation for loss resulting from the depreciation of the euro can be claimed where monetary debts are concerned. Art. 1153 Civil code does not apply however to compensation for late payment of debts which need to be paid in a foreign currency. In that case additional compensation for the depreciation of money is permitted.<sup>221</sup>

#### 1.5. What is the legal basis for the payment of interest (statutes, contractual agreements, case-law, soft law guidance)?

- (BE.13) Art. 1153 Civil code contains the main rules on moratory interest. Parties may deviate contractually from this Article, in which case contractual agreements are the basis for interest payments.
- (BE.14) There is legislation on the “normal” legal interest rate.<sup>222</sup>
- (BE.15) There is legislation implementing the Late Payments Directive.<sup>223</sup>
- (BE.16) The rules on compensatory interest follow from case law. During certain periods the so-called Indicative table (a privately designed document mainly designed for the evaluation of damages resulting from traffic accidents, that had an important influence on Courts), gave guidance regarding the compensatory interest rate.<sup>224</sup>

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<sup>217</sup> Cass. 9 April 1997, *RW* 1998-99, 478; L. Kestemont, n° 56, p. 56; I. Samoy and M. Aguirre, n° 12, p. 102; W. Van Gerven and S. Covemaeker, 461.

<sup>218</sup> Cass. 20 February 2004, [www.juridat.be](http://www.juridat.be).

<sup>219</sup> Cass. 16 May 2001, [www.juridat.be](http://www.juridat.be); Cass. 8 May 2003, [www.juridat.be](http://www.juridat.be).

<sup>220</sup> L. Kestemont, n° 82, p. 70; I. Samoy and M. Aguirre, n° 26, p. 107 and n° 36, p. 112. In the cases mentioned in the previous footnote, the Supreme Court accepted that the legal interest does contain a compensation for the depreciation of money.

<sup>221</sup> H. De Page, *Traité élémentaire de droit civil belge*, III, Brussels, Bruylant, 1967, n° 141bis, p. 174; L. Kestemont, n° 63, p. 60; B. De Temmerman, n° 20, p. 1307; I. Samoy and M. Aguirre, n° 53 and 55-57, p. 121-122.

<sup>222</sup> Act of 5 May 1865 on loans on interest (as modified).

<sup>223</sup> Act 2 August 2002 on combating late payment in commercial transactions (as modified).

<sup>224</sup> M. Van Den Bossche (ed.), *De indicatieve tabel. Een praktisch werkinstrument voor de evaluatie van menselijke schade*, Brussels, Larcier, 2001, 171 and *NjW* 2004, issue 72, 10.

## Section II. Calculation of Interest

### 2.1. What is the rate of interest that is set? How is it arrived at? Are there statutes?

(BE.17) The “normal” legal interest rate for 2015 is 2,5%. Since 1 January 2007 the “normal” legal interest rate is determined every calendar year based on the average of the EURIBOR interest rate during the month December of the previous year. This interest rate is rounded to the higher quarter percent and then increased by two percent.<sup>225</sup> Previously, the interest rate could be determined by Royal Decree.<sup>226</sup> A specific legal interest applies in case of late payment of commercial transactions.<sup>227</sup> Claims for compensation are however not covered by this specific regime.

(BE.18) In the case of moratory interest, the applicable interest rate is normally the legal interest rate. In the absence of specific legal or contractual provisions, only in case of fraud of the debtor, i.e. intentional fault, or where the damage is to be paid in foreign currency a higher interest rate may be applied provided that the creditor proves his damage concretely (Art. 1153 Civil Code).

(BE.19) In the case of compensatory interest, the Court can determine the interest rate at its discretion.<sup>228</sup> The legal interest is often applied to costs and payments made in the past, when no separate correction was made for the depreciation of money.<sup>229</sup> When the legal interest rate was 7%, often an interest rate of 5% was applied in cases where a separate correction for the depreciation of money was made. The 5% rate was suggested by the Indicative table of 2001 and 2004.<sup>230</sup> The more recent editions of the Indicative table (2008, 2012) no longer suggest a rate for compensatory interest.<sup>231</sup> When the Court does not explicitly determine the interest rate, the legal interest rate applies.<sup>232</sup>

### 2.2. Is interest simple or compound? If the interest is neither simple nor compound as defined above, please elaborate.

(BE.20) Art. 1154 Civil code provides that interest of capital may only generate interest itself following a judicial notification of default (*gerechtelijke aanmaning, sommation judiciaire that is writ of summons*) or an equivalent act or following a special agreement, provided the notification of

<sup>225</sup> Art. 2 Act of 5 May 1865 on loans on interest, as modified by the Programme Act (I) of 27 December 2006: “§1. Every calendar year the legal interest rate in both civil and commercial transactions is determined as follows: the average of the EURIBOR interest rate on 1 year during the month December of the previous year is rounded to the higher quarter percent; the interest rate obtained as such is increased by 2 percent. (...)”.

<sup>226</sup> The original Art. 2 Act of 5 May 1865, *BS* 7 May 1865 provided that the interest rates could be modified by a Royal Decree that was discussed in the Council of Ministers.

<sup>227</sup> Act 2 August 2002 on combating late payment in commercial transactions (as modified).

<sup>228</sup> Cass. 6 January 1993, *Pas.* 1993, I, 11; L. Kestemont, n° 67, p. 62; W. Van Gerven and S. Covemaeker, 462; P. Van Ommeslaghe, II, nr. 1149, p. 1642.

<sup>229</sup> B. De Temmerman, n° 46, p. 1370; L. Kestemont, n° 67, p. 62; I. Samoy and M. Aguirre, n° 43, p. 115; A. Van Oevelen, n° 24, p. 172 and n° 56, p. 204.

<sup>230</sup> M. Van Den Bossche (ed.), *De indicatieve tabel. Een praktisch werkinstrument voor de evaluatie van menselijke schade*, Brussels, Larcier, 2001, 171 and Indicatieve tabel 1 mei 2004, *NjW* issue 72, p. 10, see also [http://users.ugent.be/~rdecorte/documenten/wetgeving/2004\\_05\\_01\\_indic\\_tabel.pdf](http://users.ugent.be/~rdecorte/documenten/wetgeving/2004_05_01_indic_tabel.pdf).

<sup>231</sup> J.-L. Desmecht, Th. Papart and W. Peeters, (eds.), *Indicatieve tabel 2012*, Brugge, die Keure, 2012 and [http://www ordeexpress.be/UserFiles/ArtikelDocumenten/Indicatieve\\_tabel\\_2012.pdf](http://www ordeexpress.be/UserFiles/ArtikelDocumenten/Indicatieve_tabel_2012.pdf); *NjW* 189 van 22/10 2008, 711 and *T. Pol.* Sept. 2008, 3, 121.

<sup>232</sup> Cass. 6 November 2007, *RW* 2007-08, 1716; L. Kestemont, n° 67, p. 62.

default or the agreement concerns interest due for at least a year. This provision is intended to prevent the fast increase of debts resulting from interest on interest. It is a mandatory provision that is considered to affect the public order.<sup>233</sup> Parties can therefore not deviate from it.<sup>234</sup>

- (BE.21) Art. 1154 Civil code does not apply to debts of value.<sup>235</sup> Note however that once the amount of a debt of value has been determined by the parties or the Court, it turns into a debt of money, which is subject to Art. 1154 Civil code.<sup>236</sup> Moreover, it appears that even in cases of compensatory interest, compound interest is rarely claimed and if it is, Courts are reluctant to go beyond the boundaries of Art. 1154 Civil code.<sup>237</sup>

**2.3. What is the time for which interest is calculated? When does interest start to accrue, when does the accrual of interest end? Are there any situations where the action of the plaintiff, for example delay on his part, serves to change the time for which interest is calculated? Are there provisions for suspension of the accrual of interest?**

- (BE.22) Where monetary debts arising out of contract are concerned, moratory interest generally accrues from the moment of the notification of default.<sup>238</sup> The law or the contract may however provide that no notification of default is due and that the accrual of interest starts from the moment the payment period has expired. It accrues until payment of the main sum. As of the moment of the judicial decision, it is sometimes called judicial interest, however, this does not affect its calculation.

- (BE.23) Where debts of value arising out of contractual relationship are concerned, compensatory interest accrues from the moment of the notification of default<sup>239</sup> (unless exceptionally no notification of default is required) until the moment the amount of debt is determined by the parties or the Court. As of that moment, moratory interest accrues until payment of the main sum.<sup>240</sup>

- (BE.24) With regard to debts of value arising out of non-contractual liability, the case law of the Belgian Supreme Court is less consistent. It has decided on several occasions that the Courts may at their discretion decide as of which moment compensatory interest starts to accrue.<sup>241</sup>

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<sup>233</sup> Cass. 22 December 1938, *Pas.* 1938, I, 1405; P. Van Ommeslaghe, II, nr. 1151, p. 1647. See also W. Van Gerven and S. Covemaeker, 194 (specifying that the provision is at least mandatory). Also hold the opinion that the rule is only mandatory but does not affect the public order: C. Alter, “Le point sur...l’anatocisme”, (note on Cass. 6 January 2006), *JT* 2007, 459; X. Dieux, “Le contrat: instrument et objet de dirigisme?” in *Les obligations contractuelles*, Ed. J. Barreau, 1984, nr. 10, p. 254; C. Biquet-Mathieu, 120.

<sup>234</sup> W. Van Gerven and S. Covemaeker, 194.

<sup>235</sup> Cass. 22 December 2006, *RW* 2006-07, 1439, note A. Van Oevelen; L. Kestemont, n° 87, p. 74; P. Van Ommeslaghe, II, nr. 1149, p. 1642. See also W. Van Gerven and S. Covemaeker, 614-615; Equally, the Article does not apply to due income, such as rent (Art. 1155 Civil code) or when a third party pays the interest for the benefit of the debtor, see P. Van Ommeslaghe, II, nr. 1151, p. 1647.

<sup>236</sup> I. Samoy and M. Aguirre, n°59, p. 123.

<sup>237</sup> B. De Temmerman, n° 29, p. 1330; L. Kestemont, n° 88, p. 74-75.

<sup>238</sup> Art. 1153 (3) Civil code.

<sup>239</sup> Cass. 4 September 1975, *Arr. Cass.* 1976, 20; Cass. 17 January 1992, *Arr. Cass.* 1991-92, 436; L. Kestemont, n° 73, p. 65; I. Samoy and M. Aguirre, n°45, p. 116.

<sup>240</sup> B. De Temmerman, n° 26, p. 1323; L. Kestemont, n° 57, p. 56; A. Van Oevelen, n° 11, p.162 ; I. Samoy and M. Aguirre, n° 15, p. 104.

<sup>241</sup> See e.g. Cass. 19 April 1978, *Arr. Cass.* 1978, 952; Cass. 24 February 1980, *Arr. Cass.* 1979-80, 597, *Pas.* 1980, I, 586; Cass. 8 September 1981, *Arr. Cass.* 1981-82, 30; Cass. 16 February 1983, *Arr. Cass.* 1982-83, 768, note, *Pas.* 1983, I, 677; Cass. 3 February 2010, *www.juridat.be*; T. Vanswevelt and B. Weyts, nr. 1057, p. 668.

However, it has also decided that in such cases compensatory interest accrues from the moment the damage is suffered.<sup>242</sup> The latter view is justified by the fact that compensatory interest serves to compensate additional damages arising from the delayed payment of the compensation to which the creditor is entitled as of the moment day on which the damage was suffered.<sup>243</sup> Given this purpose, compensatory interest cannot in principle be due for a period prior to the moment the damage was suffered. This can lead to difficulties when determining a fixed compensation that includes compensation for future damage. In two decisions of 13 September 2000, the Belgian Supreme Court chose a practical solution and held that the court which determines a fixed and consolidated damage may award fixed compensatory interest on that amount from the moment of consolidation insofar the damage is certain and a global assessment is feasible, even though the damage arose progressively.<sup>244</sup> This has been confirmed since.<sup>245</sup>

Compensatory interest accrues until the moment the amount of the debt is determined by the parties or the Court.<sup>246</sup> As of that moment moratory interest is due on the set amount (including compensatory interest).<sup>247</sup> If the amount is determined by a judicial decision, the moratory interest is sometimes called judicial interest.

(BE.25) There are no specific statutory rules on the suspension of the accrual of interest, but there are several ways in which the action of the claimant may be taken into account in order to limit the period for which interest is awarded or to otherwise limit the amount of interest.

(BE.26) Firstly, in cases of non-contractual liability, the creditor who caused (part of) the late payment, should bear the loss caused thereby himself. This is so even when the fact that the delayed payment did not cause damage to the debtor since he could earn interest on the sum during the period of delay.<sup>248</sup> That the creditor should bear the loss resulting from the delay in payment he caused himself is a consequence of the theory of the fault of the victim and the lack of a causal link between the damage caused by (part of) the late payment and the non-contractual fault of the other party.<sup>249</sup> An exception exists when the tortious act was intentional, while the creditor only caused the delay in payment by his negligence: The principle of *fraus omnia corrumpit* prohibits the intentional tortfeasor to derive a defence from the negligence of the victim.<sup>250</sup> The

<sup>242</sup> Cass. 7 February 1997, *R. Cass.* 1998, 184; Cass. 17 March 1999, *Pas.* 1999, I, 400; Cass. 9 April 1997, *Arr. Cass.* 1997, 422, *RW* 1998-99, 478; Cass. 8 December 1999, *Pas.* 1999, I, 1665. See also J. Petit, “Interest naar aanleiding van schade geleden uit onrechtmatige daad”, (note on Cass. 7 February 1997), *R. Cass.* 1998, 188; I. Samoy and M. Aguirre, n°46, p. 117; S. Stijns, *Leerboek Verbintenissenrecht*, II, Brugge, Die Keure, 2009, 104; W. Van Gerven and S. Covemaeker, 461; A. Van Oevelen, 2009, n°25 and 53; P. Van Ommeslaghe, II, nr. 1149, p. 1642.

<sup>243</sup> W. Van Gerven and S. Covemaeker, 461.

<sup>244</sup> Cass. 13 September 2000, *Arr. Cass.* 2000, 1346, concl. Adv. Gen. Spreutels, *Rec. Cass.* 2000, 302, note B. Wylleman, *TAVW* 2000, 332, note J. Schrijvers, *JT* 2001, 104; W. Van Gerven and S. Covemaeker, 461.

<sup>245</sup> Cass. 26 October 2005, [www.juridat.be](http://www.juridat.be); Cass. 20 March 2013, [www.juridat.be](http://www.juridat.be).

<sup>246</sup> *Ibidem*.

<sup>247</sup> Cass. 22 June 2010, [www.juridat.be](http://www.juridat.be).

<sup>248</sup> Cass. 18 September 1996, *Arr. Cass.* 1996, 769; I. Samoy and M. Aguirre, n° 72, p. 127.

<sup>249</sup> Cass. 17 May 1989, *Arr. Cass.* 1988-89, 1094, *Pas.* 1989, I, 986 and *De Verz.* 1990, 161, note M. Lambert; Cass. 18 September 1996, *Arr. Cass.* 1996, 769, *Pas.* 1996, I, 824; T. Vanswevelt and B. Weyts, nr. 1056, p. 667-668. See also L. Kestemont, n° 65, p. 61; I. Samoy and M. Aguirre, n° 71, p. 127; W. Van Gerven and S. Covemaeker, 462. But see Antwerp 23 June 1998, *RW* 1999-2000, 1298, note P. Geuens.

<sup>250</sup> See Cass. 6 November 2002, [www.juridat.be](http://www.juridat.be); B. Weyts, “Fraus omnia corrumpit in het buitencontractueel aansprakelijkheidsrecht: geen aansprakelijkheidsverdeling in geval van opzet”, (note on Cass. 6 November 2002), *RW* 2002-03, 1632; B. Weyts, *De fout van het slachtoffer in het buitencontractueel aansprakelijkheidsrecht*, Antwerp, Intersentia, 2003, n° 561, p. 479.

fact that the debtor himself did not take action to speed up the process is however not sufficient to award interest during the period of delay caused by the creditor.<sup>251</sup>

The Court which concludes that the creditor himself caused (part of) the delay may decide not to award interest over the period of delay caused by the creditor or in the case of compensatory interest or to apply a lower interest rate over the entire period.<sup>252</sup>

- (BE.27) Secondly, both in cases of contractual and non-contractual liability the doctrine of abuse of law may be applied. According to this doctrine, a person abuses his right when he exercises a right in a manner which manifestly exceeds the boundaries of the normal exercise of that right by a reasonable and careful person. This is for example the case when a right is exercised with the sole purpose of damaging the other party or when the disadvantage the exercise of that right causes to the other party is disproportionate to the benefit it brings the person exercising the right. When the Court finds that the interest claim is exercised abusively, it may mitigate it for example by not awarding interest for the period of the delay caused by the creditor himself or even by rejecting the interest claim entirely.<sup>253</sup>

**2.4. Are there any specific provisions if payment is requested in a different currency than that in the state where the lawsuit is brought? (e.g. a Swedish company claims for damages resulting from an EU-wide cartel against a German cartel member in Germany. Can the court award only EUR or also Swedish Krona?)**

- (BE.28) Pursuant to the wording of Art. 3 Act of 30 December 1885 as modified by Act 12 July 1991, courts may order payment of sums of money expressed in euro or in another currency used in an OECD Member State. It has been argued however that pursuant to the intention of the legislator, courts may also express their judgment in another currency, but they need to allow payment in euros when payment is to take place in Belgium.<sup>254</sup>

- (BE.29) If payment is to take place in a currency other than the euro and moratory interest is due, an additional compensation for the depreciation of the currency can be awarded (cf. *supra* n° 12).

- (BE.30) Also when compensatory interest is due, a compensation for the depreciation of money can be awarded on top where this is necessary to achieve the aim of full compensation. It is only a terminological or practical matter whether they are included in the interest rate determined for the compensatory interest or considered as a separate head of damages. This also applies when payment is to be made in euro (cf. *supra* n° 11)<sup>255</sup>.

**2.5. As damage claims for infringements of EU competition rules often pertain to long-running infringements, please include all applicable interest rates and the date the rate came into force from 1 January 1985 until today. Unless impossible due to national peculiarities, the rates should be listed in a two column table, containing the rate and the date it came into force. This should be accompanied by a legal retrospective that sets out**

<sup>251</sup> Cass. 19 October 1983, *Pas.* 1983, 171; I. Samoy and M. Aguirre, n° 72, p. 127.

<sup>252</sup> Cass. 17 May 1989, *Arr.bCass.* 1988-89, 1094; Cass. 18 September 1996, *Arr.Cass.* 1996, 769; I. Samoy and M. Aguirre, n° 73, p. 127; A. Van Oevelen, 2009, n° 60. See also Indicative table 2008, *NjW* 2008, n° 59, p. 717.

<sup>253</sup> Cass. 17 October 2008, [www.juridat.be](http://www.juridat.be); I. Samoy and M. Aguirre, n° 74, p. 128. See further K. Vanderschot, “Rechtsverwerking en rechtsmisbruik: een stand van zaken, in het bijzonder met betrekking tot de opeising van verwijlrenten”, (note on Liège 17 June 2002), *TBBR* 2003, 448.

<sup>254</sup> K. Bernauw, “De plaatsing van risico’s bij extra-communautaire verzekeraars (partim privaatrechtelijk)” in J. Rogge (ed.), *Liber amicorum Jean-Luc Fagnart*, Louvain-la-Neuve, Anthemis, 2008, 71; F. Rigaux and M. Fallon, *Droit international privé*, Brussels, Larcier, 2005, n° 14.71, p. 821-822.

<sup>255</sup> See further L. Kestemont, n° 81 et seq. p. 70 et seq.

any other changes to the relevant interest regime (e.g. the time interest starts to run, etc.) which occurred over this period, in order to allow a determination of which rules applied at a given point in time between 1 January 1985 and today.

Table 1 - Interest Rates

Date	Rate
01/08/1981	12.00%
01/08/1985	10.00%
01/08/1986	8.00%
01/09/1996	7.00%
01/01/2007	6.00%
01/01/2008	7.00%
01/01/2009	5.50%
01/01/2010	3.25%
01/01/2011	3.75%
01/01/2012	4.25%
01/10/2013	2.75%
01/10/2014	2.75%
01/10/2015	2.50%

**2.6. Please identify an official, reliable, publicly available source that publishes the pertinent legal interest rates as they change.**

(BE.31) The interest rates are published in the Belgisch Staatsblad/Moniteur Belge, the Belgian official journal, see [www.staatsblad.be](http://www.staatsblad.be) or [www.moniteur.be](http://www.moniteur.be).

**2.7. If interest rates change on a fixed schedule, please indicate the schedule.**

(BE.32) Since the modification of Art. 2, §1 Act 5 May 1865 on loans on interest in 2006<sup>256</sup>, the “normal” legal interest rate is determined yearly by Royal Decision and published in the Belgian Official journal during the month January.

(BE.33) The special interest rate for late payment of commercial transactions is determined twice a year and published in the Belgian official journal, normally in January and July.<sup>257</sup>

**2.8. If part of the debt / the damage is being paid, how is interest calculated following that payment? In particular, do partial payments first cover interest or the principal amount? Is there any provision or legal practice similar to Art. 86(3)(2) of the rules of application of Regulation 966/2012 on the financial rules applicable to the general budget of the Union where it is stated that “Any partial payments shall first cover the interest”?**

(BE.34) Pursuant to Art. 1254 Civil code a partial payment is in the first place imputed to the interest. Only with the consent of the creditor a partial payment may be imputed on the main sum

<sup>256</sup> Modified by Articles 87 and 88 Program Act (I) of 27 December 2006.

<sup>257</sup> Art. 2, 4° Act 2 August 2002 on combating late payment in commercial transactions (as modified by Act 22 November 2013).

first.<sup>258</sup> The main sum that is not paid continues to earn interest. Art. 1254 Civil code applies to all monetary debts and to debts of value arising out of contractual relationships.<sup>259</sup>

(BE.35) Art. 1254 Civil code does not, however, apply to debts of value arising out of non-contractual liability.<sup>260</sup> Note however that once the judgment determines the value of the compensation, the debt which was originally a debt of value turns into a debt of money to which Art. 1254 applies.

(BE.36) When in cases of non-contractual liability payments have been made before the final judgment determining the amount of the damages, the Court will generally increase the payments that were already made with interest at the rate of the compensatory interest as of the day of payment and then deduce this sum from the total amount of damages increased with compensatory interest.<sup>261</sup> The interest on the provisional payments needs to be taken into account in order to prevent overcompensation.<sup>262</sup>

**2.9. Please calculate interest in the following hypothetical case. All dates are given in the format dd.mm.yyyy. All amounts are stated without specifying the currency to abstract from implications of the introduction of the common Euro currency. Assume that the claims have not been time barred. Assume that a national court in the Member State on which you are reporting has jurisdiction to rule on the case. Assume that the cartelists are jointly liable for the damage caused by the cartel. If results differ materially depending on whether accrual of interest is based purely on national law or made in compliance with the EU principle of full compensation, provide both calculations.**

**There was a long running pan-European cartel for a product that materially affected trade between Member States. The cartel lasted from the beginning of 1993 until the dawn raids (unannounced inspections) of the European Commission on 02.02.2009.**

**On 30.11.2010, a longtime customer of the cartel, who bought the cartelised product in the Member State on which you are reporting, brings a claim for damages against three cartelists (A, B, and C). All of the three defendants have their seat in the Member State on which you are reporting. The customer only bought the cartelised product of the cartelists A and B. In the writ, the claimant specifies the damages caused by the cartel and the date on which the respective damage occurred. The claimant also specifically requests that interest be paid on the damages. The damages (always = 100) and respective dates are set out in Table 2 below. Should a subjective rate be of relevance, you will find the ROI (Return On Investment) rates of the claimant and the three defendants in Table 3 below. You will also find the average interest rate that the claimant had to pay on credit taken out in that year (claimant's average refinance rate).**

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<sup>258</sup> Art. 1254 Civil code: A debtor of a debt that yields interest or arrears, may not impute payment to the capital rather than on the arrears or interest but with the consent of the creditor; a payment made on the capital and interest, which does not discharge the whole debt is in the first place attributed to the interest.

<sup>259</sup> L. Kestemont, n° 75 et seq., p. 66 et seq.; I. Samoy and M. Aguirre, n° 48, p. 118.

<sup>260</sup> Cass. 23 September 1986, RW 1986-87, 2143, JT 1987, 173; Cass. 23 February 1988, RW 1988-89, 677; Cass. 7 February 1997, R. Cass. 1998, 184; Cass. 22 October 2003, Pas. 2003, I, 1669; C. Biquet-Mathieu, 1998, nr. 158; W. Van Gerven and S. Covemaeker, 615; P. Van Ommeslaghe, II, nr. 1149, p. 1643. Critically: B. De Temmerman, 1332 et seq. I. Samoy and M. Aguirre, n° 48-49, p. 118-119.

<sup>261</sup> A. Van Oevelen, 2009, n° 58, p. 206-207; I. Samoy and M. Aguirre, n° 50, p. 119.

<sup>262</sup> Cass. 22 April 1997, Arr. Cass. 1997, 474; I. Samoy and M. Aguirre, n° 50, p. 119.



**On 26.11.2013 a court renders a final judgment, ordering the defendant(s) to pay damages and interest. The defendants take until 12.02.2014 to pay. Please specify the total amount the jointly liable defendants have to pay on 12.02.2014 in order to relinquish their debt towards the claimant.**

Table 2 - Damage Amounts and Dates

Date the Damage Occurred	Damage Amount
15/11/1993	100
17/09/1996	100
22/02/2006	100
12/08/2008	100

Table 3 - Refinance and Return on Investment Rates

Year	Claimant's Refinance Rate	Claimant's Annual ROI	Defendant's A Annual ROI	Defendant's B Annual ROI	Defendant's C Annual ROI
1993	6.00%	5.50%	4.00%	4.00%	3.00%
1994	6.00%	9.80%	4.00%	4.00%	4.00%
1995	6.00%	9.50%	4.00%	4.00%	5.00%
1996	6.00%	1.00%	0.00%	0.00%	0.00%
1997	8.00%	-3.80%	1.00%	1.00%	3.00%
1998	8.00%	1.10%	4.00%	4.00%	5.00%
1999	8.00%	2.80%	1.00%	1.00%	3.00%
2000	8.00%	1.10%	-2.00%	-1.00%	0.00%
2001	8.00%	4.51%	2.00%	2.00%	3.00%
2002	8.00%	5.30%	4.00%	4.00%	5.00%
2003	8.00%	8.21%	9.00%	9.00%	9.00%
2004	7.00%	9.00%	3.00%	3.00%	2.00%
2005	7.00%	10.00%	1.00%	1.00%	1.00%
2006	7.00%	6.00%	1.00%	1.00%	1.00%
2007	5.00%	-5.00%	4.00%	4.00%	2.00%
2008	5.00%	-7.00%	-1.00%	0.00%	0.00%
2009	5.00%	-5.00%	2.00%	2.00%	4.00%
2010	5.00%	-3.00%	4.00%	4.00%	4.00%
2011	5.00%	-2.70%	4.00%	4.00%	2.00%
2012	5.00%	1.61%	-2.00%	-1.00%	0.00%
2013	5.00%	4.40%	8.00%	8.00%	7.00%
2014	5.00%	1.41%	-4.00%	-3.00%	-1.00%

If not stated otherwise by the corresponding legislation, all calculations should be: i) done with the highest precision possible; ii) based on a determination of the exact part of the month and of the year matured, taking account of leap years. Table 4 below provides an example related to a simplified scenario. It should be noted that Table 4 below shows the capital and the accrued interest rounded to two decimal places (whole cents) only for ease of presentation.

- (BE.37) Up until the quantification of damages by the judicial decision, we are dealing with a debt of value. This means that until the date of the judgment that determines the amount of the compensation (or an agreement between the parties to this end), compensatory interests are due. The aim of compensatory interest is full compensation. However, within the boundaries of the pleadings of the parties, the Courts have wide discretion in determining the starting point of the interest and the interest rate which in their opinion will lead to full compensation. Generally, the starting point will be the date when the damage arose, i.e. the date of payment of the deliveries. Regarding the interest rate, there is room for the claimant to prove that his actual damage resulting from not-having available the sum of the overcharges paid, consists of its refinancing rate or its annual return on investment. In order to claim its average refinancing rate, the claimant will need to prove that it has actually taken out money during that year. Since the annual rate on investment in this particular case is generally lower than the average refinance rate, it will be in the claimant's interest to try and deliver the proof that he/she actually borrowed money and would not have done so to the extent of the overcharges, if the claimant had these sums at its disposal. The Court may consider the proof sufficient and apply the refinance rate, it may also decide that the required proof has not been delivered and it is impossible to determine the actual amount of the loss resulting from the late payment of the compensation and therefore choose for an assessment *ex aequo et bono* applying the legal interest rate or any other interest rate. It might also find that the aim of full compensation is best reached by applying the return on investment. Moreover, it is in theory up to the Court to determine whether simple or compound interest is best suited to reach the aim of full compensation. Conceptually, achieving full compensation by employing the ROI or the average lending rate of the claimant logically implies compound interest with those rates. As these are calculations to determine the value (to give a sum to) the dette de valeur/waardeschuld, article 1154 Code civil does not preclude using compound interest. Determination of damage and interest are inextricably linked at this stage. It is likely that an expert will be appointed to determine whether the loss resulting from the late payment can be determined and how. Practically, compound interest is rarely claimed and if so Courts do not often go beyond the boundaries of Art. 1154 Civil code. By consequence, there currently is a lot of uncertainty.
- (BE.38) As of the moment of the judgement normally the legal interest will be due on the amount of the damage determined by the Court including the compensatory interest that accrued thus far.
- (BE.39) If the legal interest would be applied and the interest would be simple, the calculation would be as follows:

Table 4 – Calculation based on single legal interest - Payment of 15/11/1993

From	To	Amount	Interest Rate	Total Days	Days in a Year	Interest
15/11/1993	31/12/1993	100	8.00	47	365	1.03
01/01/1994	31/12/1994	100	8.00	365	365	8.00
01/01/1995	31/12/1995	100	8.00	365	365	8.00
01/01/1996	31/8/1996	100	8.00	244	366	5.33
01/09/1996	31/12/1996	100	7.00	122	366	2.33
01/01/1997	31/12/1997	100	7.00	365	365	7.00
01/01/1998	31/12/1998	100	7.00	365	365	7.00
01/01/1999	31/12/1999	100	7.00	365	365	7.00
01/01/2000	31/12/2000	100	7.00	366	366	7.00

01/01/2001	31/12/2001	100	7.00	365	365	7.00
01/01/2002	31/12/2002	100	7.00	365	365	7.00
01/01/2003	31/12/2003	100	7.00	365	365	7.00
01/01/2004	31/12/2004	100	7.00	366	366	7.00
01/01/2005	31/12/2005	100	7.00	365	365	7.00
01/01/2006	31/12/2006	100	7.00	365	365	7.00
01/01/2007	31/12/2007	100	6.00	365	365	6.00
01/01/2008	31/12/2008	100	7.00	366	366	7.00
01/01/2009	31/12/2009	100	5.50	365	365	5.50
01/01/2010	31/12/2010	100	3.25	365	365	3.25
01/01/2011	31/12/2011	100	3.75	365	365	3.75
01/01/2012	31/12/2012	100	4.25	366	366	4.25
01/01/2013	25/11/2013	100	2.75	329	365	2.48
						<b>126.93</b>

Table 5 – Calculation based on single legal interest - Payment of 17/9/1996

From	To	Amount	Interest Rate	Total Days	Days in a Year	Interest
17/09/1996	31/12/1996	100	7.00	106	366	2.03
01/01/1997	31/12/1997	100	7.00	365	365	7.00
01/01/1998	31/12/1998	100	7.00	365	365	7.00
01/01/1999	31/12/1999	100	7.00	365	365	7.00
01/01/2000	31/12/2000	100	7.00	366	366	7.00
01/01/2001	31/12/2001	100	7.00	365	365	7.00
01/01/2002	31/12/2002	100	7.00	365	365	7.00
01/01/2003	31/12/2003	100	7.00	365	365	7.00
01/01/2004	31/12/2004	100	7.00	366	366	7.00
01/01/2005	31/12/2005	100	7.00	365	365	7.00
01/01/2006	31/12/2006	100	7.00	365	365	7.00
01/01/2007	31/12/2007	100	6.00	365	365	6.00
01/01/2008	31/12/2008	100	7.00	366	366	7.00
01/01/2009	31/12/2009	100	5.50	365	365	5.50
01/01/2010	31/12/2010	100	3.25	365	365	3.25
01/01/2011	31/12/2011	100	3.75	365	365	3.75
01/01/2012	31/12/2012	100	4.25	366	366	4.25
01/01/2013	25/11/2013	100	2.75	329	365	2.48
						<b>104,26</b>

Table 6 – Calculation based on single legal interest - Payment of 22/6/2006

From	To	Amount	Interest Rate	Total Days	Days in a Year	Interest
22/02/2006	31/12/2006	100	7.00	313	365	6.00
01/01/2007	31/12/2007	100	6.00	365	365	6.00
01/01/2008	31/12/2008	100	7.00	366	366	7.00

01/01/2009	31/12/2009	100	5.50	365	365	5.50
01/01/2010	31/12/2010	100	3.25	365	365	3.25
01/01/2011	31/12/2011	100	3.75	365	365	3.75
01/01/2012	31/12/2012	100	4.25	366	366	4.25
01/01/2013	25/11/2013	100	2.75	35	365	2.48
						<b>38.23</b>

Table 7 – Calculation based on single legal interest - Payment of 12/8/2008

From	To	Amount	Interest Rate	Total Days	Days in a Year	Interest
12/08/2008	31/12/2008	100	7.00	142	366	2.72
01/01/2009	31/12/2009	100	5.50	365	365	5.50
01/01/2010	31/12/2010	100	3.25	365	365	3.25
01/01/2011	31/12/2011	100	3.75	365	365	3.75
01/01/2012	31/12/2012	100	4.25	366	366	4.25
01/01/2013	25/11/2013	100	2.75	35	365	2.48
						<b>21.94</b>

Total of compensatory interest: 291.93

Moratory interest is due on main sums + compensatory interest as of the 26/11/2013 until 12.02.2014. This means:

**Table 8 – Calculation based on single legal interest – Moratory interest on main sums + compensatory interest**

From	To	Amount	Interest Rate	Total Days	Days in a Year	Interest
26/11/2013	31/12/2013	691.36	2.75	36	365	1.88
01/01/2014	12/02/2014	691.36	2.75	43	365	2.24
						<b>4.11</b>

Total amount to be paid: 691.36 + 4.11= 695.47

- (BE.40) If the claimant can prove that full compensation can better be achieved using the claimants refinance rate (which the Court may use as the compensatory interest rate or as a means to achieve full compensation without using the concept of interest):

Table 9 – Calculation based on claimant's refinance rate - Payment of 15/11/1993

From	To	Amount	Interest Rate	Total Days	Days in a Year	Interest
15/11/1993	31/12/1993	100	6.00%	47	365	0.77
01/01/1994	31/12/1994	100	6.00%	365	365	6.00
01/01/1995	31/12/1995	100	6.00%	365	365	6.00
01/01/1996	31/12/1996	100	6.00%	366	366	6.00
01/01/1997	31/12/1997	100	8.00%	365	365	8.00
01/01/1998	31/12/1998	100	8.00%	365	365	8.00

*Belgium*

01/01/1999	31/12/1999	100	8.00%	365	365	8.00
01/01/2000	31/12/2000	100	8.00%	366	366	8.00
01/01/2001	31/12/2001	100	8.00%	365	365	8.00
01/01/2002	31/12/2002	100	8.00%	365	365	8.00
01/01/2003	31/12/2003	100	8.00%	365	365	8.00
01/01/2004	31/12/2004	100	7.00%	366	366	7.00
01/01/2005	31/12/2005	100	7.00%	365	365	7.00
01/01/2006	31/12/2006	100	7.00%	365	365	7.00
01/01/2007	31/12/2007	100	5.00%	365	365	5.00
01/01/2008	31/12/2008	100	5.00%	366	366	5.00
01/01/2009	31/12/2009	100	5.00%	365	365	5.00
01/01/2010	31/12/2010	100	5.00%	365	365	5.00
01/01/2011	31/12/2011	100	5.00%	365	365	5.00
01/01/2012	31/12/2012	100	5.00%	366	366	5.00
01/01/2013	25/11/2013	100	5.00%	329	365	4.51
						<b>130.28</b>

Table 10 – Calculation based on claimant's refinance rate - Payment of 17/9/1996

From	To	Amount	Interest Rate	Total Days	Days in a Year	Interest
17/09/1996	31/12/1996	100	6.00%	106	366	1.74
01/01/1997	31/12/1997	100	8.00%	365	365	8.00
01/01/1998	31/12/1998	100	8.00%	365	365	8.00
01/01/1999	31/12/1999	100	8.00%	365	365	8.00
01/01/2000	31/12/2000	100	8.00%	366	366	8.00
01/01/2001	31/12/2001	100	8.00%	365	365	8.00
01/01/2002	31/12/2002	100	8.00%	365	365	8.00
01/01/2003	31/12/2003	100	8.00%	365	365	8.00
01/01/2004	31/12/2004	100	7.00%	366	366	7.00
01/01/2005	31/12/2005	100	7.00%	365	365	7.00
01/01/2006	31/12/2006	100	7.00%	365	365	7.00
01/01/2007	31/12/2007	100	5.00%	365	365	5.00
01/01/2008	31/12/2008	100	5.00%	366	366	5.00
01/01/2009	31/12/2009	100	5.00%	365	365	5.00
01/01/2010	31/12/2010	100	5.00%	365	365	5.00
01/01/2011	31/12/2011	100	5.00%	365	365	5.00
01/01/2012	31/12/2012	100	5.00%	366	366	5.00
01/01/2013	25/11/2013	100	5.00%	329	365	4.51
						<b>113.24</b>

Table 11 – Calculation based on claimant's refinance rate - Payment of 22/6/2006

From	To	Amount	Interest Rate	Total Days	Days in a Year	Interest
22/02/2006	31/12/2006	100	7.00%	313	365	6.00
01/01/2007	31/12/2007	100	5.00%	365	365	5.00
01/01/2008	31/12/2008	100	5.00%	366	366	5.00
01/01/2009	31/12/2009	100	5.00%	365	365	5.00
01/01/2010	31/12/2010	100	5.00%	365	365	5.00
01/01/2011	31/12/2011	100	5.00%	365	365	5.00
01/01/2012	31/12/2012	100	5.00%	366	366	5.00
01/01/2013	26/11/2013	100	5.00%	329	365	4.51
						<b>40.51</b>

Table 12 – Calculation based on claimant's refinance rate - Payment of 12/8/2008

From	To	Amount	Interest Rate	Total Days	Days in a Year	Interest
01/01/2008	31/12/2008	100	5.00%	142	366	1.94
01/01/2009	31/12/2009	100	5.00%	365	365	5.00
01/01/2010	31/12/2010	100	5.00%	365	365	5.00
01/01/2011	31/12/2011	100	5.00%	365	365	5.00
01/01/2012	31/12/2012	100	5.00%	366	366	5.00
01/01/2013	26/11/2013	100	5.00%	329	365	4.51
						<b>26.45</b>

Total of compensatory interests (if the Court chooses to use this word) is 309.19

Moratory interests are then due on  $400 + 309.19 = 709.19$

Table 13 – Calculation based on claimant's refinance rate – Moratory interests on main sums + “compensatory interest”

From	To	Amount	Interest Rate	Total Days	Days in a Year	Interest
26/11/2013	31/12/2013	710.48	2.75	36	365	1.93
01/01/2014	12/02/2014	710.48	2.75	43	365	2.30
						<b>4.23</b>

Total to be paid on 12/2/2014:  $709.19 + 4.23 = 714.71$ .

### Section III. Procedural aspects

#### 3.1. What are the procedures for the party seeking to receive interest on the damages paid? (e.g. does the claimant have to make a separate plea for the interest payments and if so, what information and evidence must be supplied? Does the judge award interest *ex officio* or does the claimant have to request it?).

- (BE.41) Pursuant to Art. 1153 Civil code interest on debts of money is moratory interest at the legal interest rate. Art. 1153 Civil code thus contains an irrebuttable presumption that late payment of a debt of money causes damage and it abstractly determines the amount of the damage.<sup>263</sup> There is no need for the creditor to prove that he suffered damage as a result of the late payment, or to prove the amount of the resulting damage.<sup>264</sup> However, interest may only be awarded when claimed (Art. 1138 Code of civil procedure).
- (BE.42) Compensatory interest may only be awarded when claimed in the writ, the claimant's conclusions or the notification of default.<sup>265</sup> In principle, the creditor also needs to prove that he suffered damage as well as how much damage he suffered.<sup>266</sup> Nevertheless, in practice this proof is seldom requested. The mere fact that compensation is paid late usually suffices to assume that damage was suffered.<sup>267</sup>
- (BE.43) The Court however has the power to interpret the claimant's claim. For example, when the claimant claims compensatory interest without indicating the interest rate, the court may decide that the claimant intended to claim the legal interest rate.<sup>268</sup> Equally, when the claimant claims interest without specifying whether he claims moratory or compensatory interest, the Court may determine the claimant's intention by means of interpretation.<sup>269</sup>
- (BE.44) When the claimant's claim is not unclear but incomplete and the claimant neglected to legally qualify its claim, the Court may fill in this gap. Where the claimant claims interest without specifying whether he claims moratory or compensatory interest and the Court cannot determine the claimant's intention by means of interpretation, it may nevertheless fill in the gap and decide to award compensatory interest.<sup>270</sup> Whether the Court may modify a claim for moratory interest into a claim for compensatory damages when the wrong type of interest is claimed is disputed.<sup>271</sup> It has been argued that the Court should be allowed to do this provided it does not award more than what is claimed.<sup>272</sup>

<sup>263</sup> In this sense B. De Temmerman, n° 20, p. 1305; L. Kestemont, n° 59, p. 57; H. De Page, *Traité*, III, n° 140, p. 173; I. Samoy and M. Aguirre, n° 4, p. 98-99; A. Van Oevelen, n° 10, p. 160-161.

<sup>264</sup> L. Kestemont, n° 59, p. 57; S. Stijns, 180; W. Van Gerven and S. Covemaeker, 599.

<sup>265</sup> Cass. 21 June 1978, *Arr. Cass.* 1978, 1231, *Pas.* 1978, I, 1197, note; P. Van Ommeslaghe, II, nr. 1149, p. 1642. See also K.. Marchand and S. Vereecken, "Gerechtigde intresten : moratoire of compensatoire en aan welke rentevoet?" in D. Serrus (ed.), *Actualia Gerechtigd recht*, Brussels, Larcier, 2008, 19.

<sup>266</sup> L. Kestemont, n° 61, p. 58; I. Samoy and M. Aguirre, n° 34, p. 110-111.

<sup>267</sup> B. De Temmerman, n° 46, p. 1370; L. Kestemont, n° 61, p. 58; I. Samoy and M. Aguirre, n°35, p. 111.

<sup>268</sup> Cass. 4 May 1977, *Arr. Cass.* 1977, 908; I. Samoy and M. Aguirre, n° 79, p. 129-130.

<sup>269</sup> I. Samoy and M. Aguirre, n° 79, p. 130. See Cass. 1 October 1998, *Arr. Cass.* 1998, 929 although it is unclear if this was a case of interpretation or gap-filling.

<sup>270</sup> I. Samoy and M. Aguirre, n° 80, p. 130.

<sup>271</sup> B. Allemeersch, *Taakverdeling in het burgerlijk procesrecht*, Antwerp, Intersentia, 2007, n° 134.

<sup>272</sup> I. Samoy and M. Aguirre, n° 80, p. 130.

- (BE.45) **Furthermore, a Court will not be considered to infringe the principle *ne ultra petita* when it awards a different main sum other than what is claimed and/or a different sum of interest than claimed, provided that the total of interest and main sum does not exceed the total amount claimed.<sup>273</sup> The Court may however not award a higher interest rate than claimed.<sup>274</sup>**

### 3.2.

#### **3.2. Can the judge award a higher interest amount than requested by the claimant or does the principle of *ne ultra petita* apply?**

- (BE.46) Under Belgian law the prohibition to judge *ultra petita*<sup>275</sup> implies that the Court may not award a higher interest amount or apply a higher interest rate than claimed by the claimant.<sup>276</sup>

#### **3.3. Can the judge estimate interest or does interest always have to be calculated?**

- (BE.47) In the case of obligations to pay damages, the Court may decide not to award interest as such, but to take the course of time into account when determining the amount of damages.<sup>277</sup> If the Court gives the reason why it cannot accept the calculation of the amount of damages put forward by the claimant and states that it is impossible to determine the damage otherwise, the Court may determine the amount of damages *ex aequo et bono*.<sup>278</sup>

#### **3.4. If the claimant changes the request regarding the interest, is this regarded as an amendment of the pleadings? Is this only possible until a certain stage into the proceedings and precluded later on or can the claimant make such changes without negative procedural consequences at any time up to the judgment?**

- (BE.48) Pursuant to Article 807 Code of civil procedure, a pending claim can be extended or modified if the new conclusions in a defended action are based on a fact or instrument alleged in the writ, even if the legal description differs. Art. 807 Code of civil procedure adds that in all stages of the proceedings and even *in absentia* of the other party a party may claim interest which accrued since the start of the proceedings as well as later proven increases of the claim or damages. Pursuant to Article 1042 Code of civil procedure these rules also apply on appeal.

## **Section IV. Specific Instances**

#### **4.1. Identify any cases relating to damages claims for infringements of competition law and explain how interest was calculated. In writing these summaries, provide all relevant**

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<sup>273</sup> Cass. 4 May 1977, *Arr. Cass.* 1977, 908; Cass. 22 October 2002, *Arr. Cass.* 2002, 2245; Cass. 20 January 1988, *Arr. Cass.* 1987-88, 629; I. Samoy and M. Aguirre, n° 81, p. 130.

<sup>274</sup> I. Samoy and M. Aguirre, n° 81, p. 130-131. Cf. K. Marchand and S. Vereecken, 19.

<sup>275</sup> Art. 1138, 2° Code of civil procedure.

<sup>276</sup> I. Samoy and M. Aguirre, n° 81, p. 130-131. Cf. K. Marchand and S. Vereecken, 19.

<sup>277</sup> W. Van Gerven and S. Covemaeker, 462.

<sup>278</sup> See e.g. Cass. 4 October 2010, [www.juridat.be](http://www.juridat.be); Cass. 22 April 2009, [www.juridat.be](http://www.juridat.be); Cass. 20 February 2004, [www.juridat.be](http://www.juridat.be).



**information about how interest and other compensation for the effluxion of time was calculated.**

(BE.49) Court of Appeal Brussels 24 June 2008

An insurance company who refused to make to one broker the same offer he made to another broker for the same set of insurance contracts, was (contestably) held to have infringed Art. 2 WBEM. The disadvantaged broker claimed a compensation of € 50.000. According to the insurance company the concerned contracts represented commissions for a sum of €32.876,30 per year. The court held that the claimant could only be awarded damages for the loss of a chance to conclude the insurance contracts. The Court evaluated the damage ex aequo et bono. Belgian law allows for this provided that the judge indicates the reasons why he cannot apply the calculation suggested by the claimant and he finds that the damage cannot be determined otherwise. The Court considered these conditions fulfilled. The claimant failed to provide concrete elements for the calculation of the damages and his damage consisted of a loss of a chance, which can only be determined ex aequo et bono. The claimant was awarded €25.000 increased with judicial interests at the legal interest rate.<sup>279</sup>

(BE.50) Commercial court Brussels 17 June 2010<sup>280</sup>

Two companies, SA Compagnie de Promotion Liègeoise (CPL) and SA Wilhelm & Co, were planning to build a large cinema complex in Liège. A third company, SA UGC was interested in financing, owning and exploiting the complex. Wilhelm & Co had concluded two framework agreements with UGC and the parties were involved in negotiations for a third one.

Shortly after CPL had obtained a building permit, the permit was challenged by Kinopolis, the incumbent, dominant cinema group. Wilhelm & Co then broke off the negotiations with UGC. CPL obtained a new building permit that was favourable to Kinopolis. Subsequently, Kinopolis renounced from the further pursuit of the proceedings regarding the first building permit and concluded a contract with Wilhelm & Co for the exploitation of the cinema complex.

The Brussels commercial court found that Kinopolis's conduct amounted to an abuse of its dominant position and that Wilhelm & Co's behaviour was contrary to the duty of loyalty. The Court also found that these illegal acts were causally related to the certain types of damage suffered by UGC, namely the costs of architects and of credit obtained in view of the realisation of the project. The Court therefore held Kinopolis, CPL and Wilhelm & Co jointly liable for these costs, increased with compensatory interest at the legal interest rate as of a certain date (10 July 2006) until the day of the judgment and with judiciary interest at the legal interest rate as of the day of the judgment. The judgment did not give reasons for the day as of which the interest accrued, or the interest rate. It did not indicate the day until which the judiciary interest would accrue, but this can be held to be the day of payment. The Court also held Kinopolis, CPL and Wilhelm & Co jointly and severally liable for the costs of legal advice relating to the framework contracts, but it could not yet reach a final decision on this issue since UGC had not made clear which part of its costs of legal advice related to the framework contracts. The parties were invited to clarify this point further and the final decision on this point was referred to a later date. The claimants request for loss of profits was rejected as the Court considered the damage and even the chance of incurring this type of damage not

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<sup>279</sup> CA Brussels 24 June 2008 (Stekelorum Insurance SA/Vivium), *RGAR* 2010, 14692. The published part of the case does not mention anything about interest.

<sup>280</sup> [www.tbm-rcb.be](http://www.tbm-rcb.be).

sufficiently certain. The claimants internal costs related to the project were not considered to constitute a damage, since they formed part of the normal functioning of a company.<sup>281</sup>

**4.2. Are the rules on the award of interest specific to the kinds of claim or general principles? Are there any specific approaches/rules that you can identify in national or EU competition cases, or in other cases where the claim is brought by business against business (B2B) and are there any specific approaches/rules in business versus consumer (B2C) cases?**

(BE.51) The rules on interest discussed in this contribution form part of the civil code and apply to all kinds of claims, to B2B, B2C, C2B and C2C claims. There is a specific act on late payment in commercial transactions, but an obligation to compensate antitrust damages, will not normally<sup>282</sup> be a late payment in commercial transactions within the meaning of this act. Indeed, the said act applies only to payments made as a remuneration for commercial transactions, they do not apply to obligations to pay damages.<sup>283</sup>

***Section V. Evaluation, interpretation in conformity with EU law, and intertemporal aspect***

**5.1. Throughout the reports, evaluate how satisfactory are the rules on the calculation of interest perceived to be? In considering this question, identify any law reform proposals in the last 15 years or so, or any major judgments by the higher courts that call into question or change some of the issues pertaining to the award of damages. Please identify changes of relevant national law on interest that will come into force or are currently considered.**

(BE.52) The Belgian rules on interest are very complex. To a large extent they are based on case law, which is not always consistent. Many scholars have tried to clarify the situation, but since the terminology they use and propose is not always the same, they have also contributed to the complexity.

(BE.53) Several scholars have proposed to replace the current system with a system inspired by the Dutch civil code and to abolish the distinction between monetary debts and debts of value as well as the concept of compensatory interest. It is argued that interest on contractual claims should run from the notification of default, interest on non-contractual claims as of the moment the damage arose. Furthermore, the purpose of interest should be clarified and the legal interest rate should be determined in such a way that it covers both the fact of not having available a certain sum of money and the depreciation of money.<sup>284</sup>

(BE.54) However, no legislative changes are planned.

**5.2. For each question, where it is relevant, assess the compliance of the national interest rules with the minimum standard prescribed by EU law ('full compensation'). If national**

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<sup>281</sup> The claimant had also directed its claims for wrongful termination of negotiations against another company, but since it had not made clear how this party was involved in the facts, the Court rejected this part of the claim.

<sup>282</sup> Cf. *infra* n° 56.

<sup>283</sup> Art. 3 Act 2 August 2002 on combating late payment in commercial transactions (as modified).

<sup>284</sup> B. De Temmerman, "Interest bij schadevergoeding uit wanprestatie en onrechtmatige daad. Een stand van zaken, tevens aanleiding tot een kritische beschouwing over de grondslagen van het Belgische schadevergoedingsrecht", *TPR* 1999, 1277-1441; I. Samoy and M. Aguirre, n° 82 et seq., p. 131 et seq.

**law does not grant full compensation, please try to identify an interpretation of national law that guarantees full compensation in conformity with European law.**

- (BE.55) Belgian non-contractual liability law guarantees full compensation; compensatory interest is determined so as to achieve the aim of full compensation. Only where moratory interest is concerned, an objective approach based on the legal interest rate (unless a different conventional interest rate applies) prevails over a concrete assessment of damages, since it is very difficult to concretely determine the loss arising from the late payment of a sum of money. In practice, it is however, seen that also in cases where compensatory interest is due, the legal interest rate is often applied. This too is due the fact that it is difficult to prove which interest rate would lead to a better quantification of the actual loss suffered.
- (BE.56) In the exceptional cases where the anticompetitive infringement is at the same time a contractual non-performance the question arises whether the requirement of a notification of default for the start of the accrual of moratory or compensatory interest is compatible with EU law. In Case C-565, *Irimie*<sup>285</sup>, the CJEU decided that in cases where taxes have been levied in breach of EU law interest is due from the moment of the undue payment of the tax. It is possible that the CJEU will extend this principle to cases of breaches of EU competition law and hold that interest is due as of the moment the damage occurs (for example the moment of non-delivery as a means to exclude a downstream undertaking from the market), while a notification of default will often only be given at a later point. It must be noted however, that in the exceptional case of non-payment or late payments for goods or services with the aim of driving a supplier out of the market, the rules on late payment in commercial transactions will apply and automatically set the general requirement of a notification of default aside.<sup>286</sup>

**5.3. Finally, when assessing the overall compliance of national law with the principle of full compensation based on directly applicable EU law, please confirm that national courts have to apply it also in relation to past infringements of EU competition law or the equivalent provisions of the EEA agreement (e.g. cartels starting in the 1990ies and ending in the 2000er years).**

- (BE.57) Directive 2014/104 needs to be implemented, i.e. the national provisions implementing the Directive need to be brought into force by 27 December 2016<sup>287</sup>. Member States are ordered to ensure that the national measures adopted in order to comply with the substantive provisions of the Directive do not apply retroactively.<sup>288</sup> The fact that the Directive includes the principle of full compensation does therefore not amount to a sufficient legal basis to apply this principle to infringements of competition law which took place before the entry into force of the implementation legislation, although there will be a duty for the national Courts to interpret the national legislation in conformity with the Directive as of the moment the Directive needs to be implemented. The interpretation the Court of Justice might later on give to provisions of the Directive does not apply as such to the period before the Directive entered into force. However, to the extent that the right to compensation and the extent of the damages to which the claimant is entitled follow from the directly applicable provisions, Art. 101-102 TFEU (and their precursors), they apply to the period preceeding the entry into force of the Directive and the implementation legislation. It follows therefore, that the statements the Court of Justice made in *Manfredi* regarding the extent of the right to damages apply to that period:

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<sup>285</sup> Para 33.

<sup>286</sup> Art. 5 Act 2 August 2002 on combating late payment in commercial transactions (as modified).

<sup>287</sup> Art. 21 Directive 2014/104.

<sup>288</sup> Art. 22 Directive 2014/104.

*“In the absence of Community rules governing that field, it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages for harm caused by an agreement or practice prohibited under Article 81 EC, provided that the principles of equivalence and effectiveness are observed.*

*Therefore, first, in accordance with the principle of equivalence, if it is possible to award particular damages, such as exemplary or punitive damages, in domestic actions similar to actions founded on the Community competition rules, it must also be possible to award such damages in actions founded on Community rules. However, Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them.*

*Secondly, it follows from the principle of effectiveness and the right of individuals to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (damnum emergens) but also for loss of profit (lucrum cessans) plus interest“.*<sup>289</sup>

**5.4. Regarding the secondary subject of investigation (interest on damages due to infringements of national competition law only) Recital 12 of the preamble of Directive 2014/104/EU summarises the EU law principles regarding interest as follows:**

*“Anyone who has suffered harm caused by an infringement can claim compensation for the actual loss (damnum emergens), for the gain of which he has been deprived (loss of profit or lucrum cessans) plus interest. This is irrespective of whether the national rules define these categories separately or in combination. The payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time, and it should be due from the time the harm occurred until compensation is paid, without prejudice to the qualification of such interest as compensatory or default interest under national law. This is also without prejudice to whether effluxion of time is taken into account as a separate category (interest) or as a constituent part of actual loss of profit. It is incumbent on the Member States to lay down the rules to be applied for that purpose”.*

**Would the right to full compensation as set out by Recital 12 of the proposed directive apply to interest calculation for damages in cases where only national competition law has been infringed and the damage occurred before the implementation of the directive came into force?**

Belgian non-contractual liability law has always been based on the principle of full compensation; compensatory interest is determined so as to achieve the aim of full compensation. Only where moratory interest is concerned, an objective approach based on the legal interest rate (except in case of fraud, the case where a different conventional interest rate applies or the case where damage is to be paid in foreign currency) prevails over a concrete assessment of damages, since it is very difficult to concretely determine the loss arising from the late payment of a sum of money.<sup>290</sup>

<sup>289</sup> Joined cases C-295/04 to C-298/04, Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cannito v Fondiaria Sai SpA (C-296/04) and Nicolò Tricarico (C-297/04) and Pasqualina Murgolo (C-298/04) v Assitalia SpA, ECR 2006 I-06619.

<sup>290</sup> B. De Temmerman, n° 20, p. 1305-1306; L. Kestemont, n° 62-63, p. 59-60; I. Samoy and M. Aguirre, n° 52, p. 120.

In practice, it is however, seen that also in cases where compensatory interest is due, the legal interest rate is often applied. This too is due the fact that it is difficult to prove which interest rate would lead to a better quantification of the actual loss suffered (cf supra n° 55).

## Czech Republic

Pavlina Hubkova\*

### *Preliminary Matters*

- (CS.1) Examples of private enforcement of competition law in the Czech Republic are rather limited. There are no official statistics, but the number of private enforcement cases is estimated to be less than 15 so far. Some of the cases were settled out of the court, other cases are still pending. No final judgment awarding damages has been identified. Therefore there is practically no case law.
- (CS.2) The Competition Act enacted in 1991 included several provisions regarding the claim for damages. The new Competition Act which is in force since 2001 does not include such provisions any more. However, claims for damages due to infringements of competition law are governed by general principles of civil liability.
- (CS.3) Before 01/01/2014, the field of civil law was multifaceted. The basic provisions including generally applicable principles were contained in the “old” Civil Code (Act no. 40/1964 Coll.), while B2B relations were regulated in a specific legislation, the Commercial Code (Act no. 513/1991 Coll.). These two codes did not contain any specific legal basis for claims stemming from competition law, but such claims were implicitly possible according to civil liability provisions.
- (CS.4) The new Civil Code (Act no. 89/2012 Coll., hereinafter abbreviated as the “CC”), which is in force since 01/01/2014, replaced both of the two old codes. Currently, the civil liability is governed by this act regardless of whether the relationship is a B2B relationship or not. The new CC moreover provides explicitly for the possibility to claim damages due to infringements of competition law.<sup>291</sup>
- (CS.5) It must be noted that claims for damages when the harm occurred before 01/01/2014 is still governed by the old legislation.<sup>292</sup> The following text refers to the provisions of the new Civil Code, unless specified differently.

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<sup>291</sup> Sec. 2990 CC in connection with sec. 2988 CC. Sec. 2990 CC in original: Osoba, jejíž právo bylo ohroženo nebo porušeno nedovoleným omezením soutěže, má práva stanovená v § 2988. ENG: The person whose right has been threatened or infringed by illegal restraint of competition has rights stipulated in sec. 2988. Sec. 2988 CC in original: Osoba, jejíž právo bylo nekalou soutěží ohroženo nebo porušeno, může proti rušiteli požadovat, aby se nekalé soutěže zdržel nebo aby odstranil závadný stav. Dále může požadovat přiměřené zadostiučinění, náhradu škody a vydání bezdůvodného obohacení. ENG: The person whose right has been threatened or infringed by unfair competition may require the violator to refrain from unfair competition or to correct the defective situation. The person may also require reasonable and adequate compensation, damages or restitution of unjust enrichment.

<sup>292</sup> Sec. 3079 CC. Sec. 3079(1) CC in original: Právo na náhradu škody vzniklé porušením povinnosti stanovené právními předpisy, k němuž došlo přede dnem nabytí účinnosti tohoto zákona, se posuzuje podle dosavadních právních předpisů. ENG: The right to compensation for damages resulting from a breach of statutory obligation that occurred before the effective day of this Act shall be assessed under the existing legislation.

- (CS.6) The damage claims are to be decided by general civil courts. The proceedings are governed by the Code of Civil Procedure (Act no. 99/1963 Coll., hereinafter abbreviated as the “CCP”).
- (CS.7) In damage claims, there is no distinction between breach of national competition law and breach of EU competition law.
- (CS.8) Cartel cases often concern damages that occurred a relatively long time ago, therefore questions of limitation will frequently arise. However, this report does not address them.

## ***Section I. General principles***

### **1.1. What is interest? Is there a definition?**

- (CS.9) According to section 513 CC, interest is a kind of accessory receivable.<sup>293</sup> The law distinguishes between (general) interest (section 1802 ff CC<sup>294</sup>) and default interest (section 1970 ff CC<sup>295</sup>).<sup>296</sup>
- (CS.10) There is no statutory definition of interest. Legal theory defines interest as an amount of money which is set by the law or agreed upon in a contract as compensation for the provision of monetary means for a certain period of time. It may be agreed upon voluntarily (general interest) or it may be imposed (default interest).
- (CS.11) General interest has a remunerative function. It represents the price for money made available to the debtor who uses it legally. General interest occurs typically in the case of loans as a remuneration for the availability of creditor's money. As a matter of principle, general interest is not applicable for damages claims. It must always be agreed upon in a contract.

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<sup>293</sup> Section 513 CC in original: Příslušenstvím pohledávky jsou úroky, úroky z prodlení a náklady spojené s jejím uplatněním. ENG: Interest, default interest and costs associated with the application of the claim are accessory receivable.

<sup>294</sup> Section 1802 CC: Mají-li být plněny úroky a není-li jejich výše ujednána, platí dlužník úroky ve výši stanovené právním předpisem. Nejsou-li úroky takto stanoveny, platí dlužník obvyklé úroky požadované za úvěry, které poskytují banky v místě bydliště nebo sídle dlužníka v době uzavření smlouvy. ENG: If interest must be paid and if the rate of interest is not agreed upon, the debtor pays interest stipulated by the law. If interest is not stipulated, the debtor pays ordinary interest which is charged for loans provided by banks in the place of residence of the debtor at the time of the conclusion of the contract.

<sup>295</sup> Section 1970 CC: Po dlužníkovi, který je v prodlení se splácením peněžitého dluhu, může věřitel, který řádně splnil své smluvní a zákonné povinnosti, požadovat zaplacení úroku z prodlení, ledaže dlužník není za prodlení odpovědný. Výši úroku z prodlení stanoví vláda nařízením; neujedná-li strany výši úroku z prodlení, považuje se za ujednanou výše takto stanovená. ENG: When a debtor is in default in the payment of monetary debt, a creditor who has duly fulfilled her contractual and legal obligations may require default interest, unless the debtor is not responsible for the default. The rate of default interest is stipulated by the Regulation of the Government; such a rate applies, unless the parties agree upon a different default interest rate.

<sup>296</sup> Under the old CC, the content of respective provisions was similar. Sec. 121 old CC in original: Příslušenstvím pohledávky jsou úroky, úroky z prodlení, poplatek z prodlení a náklady spojené s jejím uplatněním. ENG: Interest, default interest, a default charge and costs associated with the application of the claim are accessory receivable. Sec. 517(2) old CC in original: Jde-li o prodlení s plněním peněžitého dluhu, má věřitel právo požadovat od dlužníka vedle plnění úroky z prodlení, není-li podle tohoto zákona povinen platit poplatek z prodlení; výši úroků z prodlení a poplatku z prodlení stanoví prováděcí předpis. ENG: As for a default with performance of a pecuniary debt, the creditor is entitled to ask the debtor to pay also default interest unless this Act stipulates that the debtor must pay a default charge; the amount of the default interest and default charge shall be stipulated by an implementing regulation. Sec. 658(1) old CC in original: Při půjčce peněžité lze dohodnout úroky. ENG: In case of a monetary loan, the parties may agree upon interest. Sec. 779 old CC in original: Vkladatel má právo na úroky nebo jiné majetkové výhody stanovené peněžním ústavem v souladu s opatřením podle zvláštních předpisů. ENG: The depositor shall be entitled to interest or other property benefits laid down by the monetary institute in accordance with special provisions.

- (CS.12) Default interest is imposed to a person/entity holding the monetary means illegally to the detriment of a creditor who cannot use the money and potentially increase its value. It has the character of a sanction, and at the same time it represents a compensatory mechanism. As a sanction, it serves to motivate the debtor to fulfil the obligation in time. As a compensatory mechanism, it covers a part of the damage incurred by the debtor due to the late payment.
- (CS.13) Default interest may result from breach of contract as well as from non-contractual relationship (tort).

**1.2. When, and under what conditions, is interest payable at all? Does this depend on whether the claim is brought in tort, breach of contract or (where applicable) restitution/unjust enrichment?**

- (CS.14) General interest is payable according to the contract. Default interest is payable from the moment when the monetary debt is due, i. e. from the day after the day when the debtor was obliged to pay (after the due date), regardless of whether the obligation accrued from tort, breach of contract or unjust enrichment.
- (CS.15) For damages claims, default interest accrues from the day after the date when the claim for damages is sought, either by an action or by a pre-action request addressed directly to the debtor. On such a day, the debt becomes due. The decisive day is when the request or the action was actually delivered to the debtor. The accrual lasts until the payment is made. The day of payment is included (it is not explicitly stipulated in the Civil Code, but it stems from practice and constant case law, e. g. Judgment of the Supreme Court from 31/08/2009, no. 33 Cdo 1450/2008).
- (CS.16) For damages claims, the Czech law does not provide any statutory provisions on the accrual of interest before the date when the claim is sought. However, according to case law, the injured person may claim the compensation for loss of profit when “the injured person had to pay certain amount of money due to which he/she failed to increase the value of such money” (case no. 25 Cdo 4563/2009, judgment of the Supreme Court from 26/01/2012). It may be deduced from such case law that the injured person may claim “something like interest” even for the period before the debtor is informed of her obligation to pay. Nevertheless, such “interest” has no statutory basis, it must always be claimed as a part of *lucrum cessans*, and the plaintiff bears a burden of proof as to the actual amount of money which he/she could gain if the damage had not occurred (No “interest rate” is set for such cases, it is up to the plaintiff to calculate the amount of money and to bear a burden of proof thereof).

**1.3. Is payment of interest compulsory or at the discretion of the court?**

- (CS.17) Default interest is not a part of the compensation for the damage suffered; therefore it can be awarded only if the plaintiff explicitly claims it. The claim for the interest may be a part of the main action for damages, or the creditor may apply a separate plea just for default interest. The court cannot go beyond the claim and award interest *ex officio*.
- (CS.18) The plaintiff may try to claim for compensation of the failure to increase the money which she did not have at her disposal due to the damage. It must be included as the *lucrum cessans* in the main action, otherwise the court cannot award it because the court cannot go beyond the plea.



#### 1.4. What is said to be the purpose of the interest payment?

- (CS.19) The purpose of general interest is to remunerate the creditor from whom the debtor borrows a certain amount of money for a certain period of time.
- (CS.20) Default interest has a preventive function because it seeks to motivate the debtor to reimburse the damage in due time. Moreover, it covers the damage inflicted upon the creditor by late payment. As such, it represents a price of money that the debtor has at her disposal for a specific period of time.
- (CS.21) According to the CC, default interest serves as a compensation of harm caused by the delay of payment after the claim was notified to the debtor; the plaintiff may claim damages for the late payment only if they exceed the interest.<sup>297</sup>

#### 1.5. What is the legal basis for the payment of interest (statutes, contractual agreements, case-law, soft law guidance)?

- (CS.22) The legal basis for general interest is a contractual agreement. The actual interest rate may be agreed upon or may be governed by a statute. Default interest is determined by the statute (the Civil Code), and it incurs *ex lege* but the actual amount of interest may be agreed upon in a contract.<sup>298</sup>

### Section II. Calculation of Interest

#### 2.1. What is the rate of interest that is set? How is it arrived at? Are there statutes?

- (CS.23) The rate of general interest is usually agreed upon in a contract. If there is no such agreement, general interest may be stipulated by the law. If interest is not stipulated, the debtor pays ordinary interest which is charged for loans provided by banks in the place of residence of the debtor at the time of the conclusion of the contract.<sup>299</sup>
- (CS.24) The rate of default interest may be agreed upon by the parties. In other cases, there is a statute (a Regulation of the Government) which sets the rate of default interest. In fact, it sets the algorithm by which the rate of default interest is calculated. For the overview of how the actual algorithm has been changed in the past, see below.

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<sup>297</sup> Sec. 1971 CC. In original : Věřitel má právo na náhradu škody vzniklé nesplněním peněžitého dluhu jen tehdy, není-li kryta úroky z prodlení. ENG: The creditor is entitled to compensation for damages resulting from failure to pay a monetary debt only if it is not covered by default interest.

<sup>298</sup> Sec. 1970 CC. In original: Po dlužníkovi, který je v prodlení se splácením peněžitého dluhu, může věřitel, který řádně splnil své smluvní a zákonné povinnosti, požadovat zaplacení úroku z prodlení, ledaže dlužník není za prodlení odpovědný. Výši úroku z prodlení stanoví vláda nařízením; neujednají-li strany výši úroku z prodlení, považuje se za ujednanou výše takto stanovená. ENG: When a debtor is in default in the payment of monetary debt, a creditor who has duly fulfilled her contractual and legal obligations may require default interest, unless the debtor is not responsible for the default. The rate of default interest is stipulated by the Regulation of the Government; such a rate applies, unless the parties agree upon a different default interest rate.

<sup>299</sup> Sec. 1802 CC. In original: Mají-li být plněny úroky a není-li jejich výše ujednána, platí dlužník úroky ve výši stanovené právním předpisem. Nejsou-li úroky takto stanoveny, platí dlužník obvyklé úroky požadované za úvěry, které poskytují banky v místě bydliště nebo sídle dlužníka v době uzavření smlouvy. ENG: If interest must be paid and if the rate of interest is not agreed upon, the debtor pays interest stipulated by the law. If interest is not stipulated, the debtor pays ordinary interest which is charged for loans provided by banks in the place of residence of the debtor at the time of the conclusion of the contract.

(CS.25) The currently applicable statute is the Regulation of the Government no. 351/2013 Coll. (in force since 01/01/2014). Default interest rate corresponds annually to the repo rate (two-week repo rate) set by the Czech National Bank for the first day of the calendar half-year in which the default occurred, increased by eight percentage points.<sup>300</sup> The interest rate remains the same for already initiated and lasting default even if the repo rate changes afterwards. The interest rate is not determined by the repo rate that applied to the first day of default but is based on the repo rate that applied to the first day of the calendar half-year in which the default occurred.

**2.2. Is interest simple or compound? If the interest is neither simple nor compound as defined above, please elaborate.**

(CS.26) Generally interest is simple.

(CS.27) However, the new CC also recognizes compound interest (interest on interest).<sup>301</sup> It may be claimed if a) such interest has been agreed upon, or if b) the claim arises out of an unlawful act, and it is calculated from the day when the claim is pending in court.

(CS.28) In practice, a case of compound interest in a damages claim may occur in a following situation. First, the debtor is asked directly by the creditor to pay damages incurred due to an unlawful act. Since that day, the simple interest starts accruing. If the debtor does not pay, the creditor submits a plea at a court. From the day of the submission, interest on interest may be claimed. It must be noted, that the claim for interest on interest is possible only in cases where the damage occurred after 01/01/2014.

**2.3. What is the time for which interest is calculated? When does interest start to accrue, when does the accrual of interest end? Are there any situations where the action of the plaintiff, for example delay on his part, serves to change the time for which interest is calculated? Are there provisions for suspension of the accrual of interest?**

(CS.29) General interest applies only in contractual relations, therefore the time for which interest is calculated is determined in the contract.

(CS.30) Default interest is calculated from the time the debtor was first asked to pay (either by a simple pre-trial request or by a submitted plea) until the payment is made.

(CS.31) In practice, the request to pay by the actual plea without a previous pre-trial request is only exceptional because without the pre-trial request the court usually does not grant reimbursement of the costs of proceedings.<sup>302</sup>

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<sup>300</sup> Regulation of the Government no. 351/2013, sec. 2.

<sup>301</sup> Sec. 1806 CC. In original: Úroky z úroků lze požadovat, bylo-li to ujednáno. Jedná-li se o pohledávku z protiprávního činu, lze úroky z úroků požadovat ode dne, kdy byla pohledávka uplatněna u soudu. ENG: Compound interest may be required if it was agreed upon. In case of a claim that arose out of an unlawful act, compound interest may be required from the day when the claim is pending in court.

<sup>302</sup> Sec. 142a CCP. In original: Žalobce, který měl úspěch v řízení o splnění povinnosti, má právo na náhradu nákladů řízení proti žalovanému, jen jestliže žalovanému ve lhůtě nejméně 7 dnů před podáním návrhu na zahájení řízení zaslal na adresu pro doručování, případně na poslední známou adresu výzvu k plnění. ENG: The plaintiff who succeeded in the proceedings concerning the fulfilment of obligation has a right to compensation of the costs of proceedings against the defendant, only if the plaintiff sent a pre-trial request to a delivery address or a lastly known address of the defendant at least 7 days before the plea is submitted.

(CS.32) Default interest starts to accrue when the debtor is informed of her duty to pay and it ends on the day the compensation is fully granted (the day of payment is included<sup>303</sup>).

(CS.33) There are no provisions for suspension of the accrual of interest. However, a general principle of default of the creditor may apply. If the creditor does not accept the duly offered payment, or if the creditor does not provide the debtor with the cooperation needed to fulfil the obligation, the creditor is in default.<sup>304</sup> In such a case, the debtor is not in default anymore and interest may not accrue.

**2.4. Are there any specific provisions if payment is requested in a different currency than that in the state where the lawsuit is brought? (e.g. a Swedish company claims for damages resulting from an EU-wide cartel against a German cartel member in Germany. Can the court award only EUR or also Swedish Krona?)**

(CS.34) The interests are to be paid in the same currency as the principal amount.<sup>305</sup> The currency must be specified in the action. This means that under Czech law, payments could be requested in a different currency than Czech Koruna. However, the court awards damages in a foreign currency if it is not contrary to the circumstances of the case, and if a) the cause of action is denominated in foreign currency, the plaintiff requires performance in a foreign currency, the exchange regulations allow the resident, who has to perform, to pay in a foreign currency without a specific authorization, or if b) any of the participants is a non-resident.<sup>306</sup>

**2.5. As damage claims for infringements of EU competition rules often pertain to long-running infringements, please include all applicable interest rates and the date the rate came into force from 1 January 1985 until today. Unless impossible due to national peculiarities, the rates should be listed in a two column table, containing the rate and the date it came into force. This should be accompanied by a legal retrospective that sets out any other changes to the relevant interest regime (e.g. the time interest starts to run, etc.) which occurred over this period, in order to allow a determination of which rules applied at a given point in time between 1 January 1985 and today.**

(CS.35) The date on which the debtor(s) were notified of their debt determines when the default of the debtor(s) starts and thus which default interest regime is applicable. Therefore, we need to distinguish defaults that occurred

(i) On or after 28/04/2005<sup>307</sup> and before or on 30/06/2010,

<sup>303</sup> According to case law. See judgment of the Supreme Court from 31 August 2009, 33 Cdo 1450/2008.

<sup>304</sup> Sec. 1975 CC. In original : Věřitel je v prodlení, nepřijal-li řádně nabídnuté plnění nebo neposkytl-li dlužníku součinnost potřebnou ke splnění dluhu. ENG: The creditor is in default if he has not accept a duly offered payment or has not provided the debtor with the cooperation needed to fulfil the obligation.

<sup>305</sup> Sec. 1804 CC. In original : Úroky se platí v téže měně jako hlavní dluh (jistina). ENG: Interest shall be paid in the same currency as the principal amount.

<sup>306</sup> Sec. 155(2) CCP. In original: Výrok rozsudku o plnění v penězích může být vyjádřen v cizí měně, neodporuje-li to okolnostem případu a jestliže a) plnění vychází z právního jednání, v němž je vyjádřeno v cizí měně, žalobce (navrhovatel) požaduje plnění v cizí měně a devizové předpisy umožňují tuzemci, který má plnit, plnění v navrhované cizí měně poskytnout bez zvláštního povolení, nebo b) některý z účastníků je cizozemcem. ENG: The operative part of the judgment awarding pecuniary performance may be denominated in a foreign currency where the circumstances permit, provided that a) the cause of action is denominated in foreign currency, the plaintiff requires performance in a foreign currency, and the exchange regulations allow the resident, who has to perform, to pay in a foreign currency without a specific authorization, or b) one of the parties is a non-resident.

<sup>307</sup> It is conjectured that there are no cases anymore in which the notification of the debtor(s) occurred before 28/04/2005 and that have not been concluded already. In order to limit the scope of the report to relevant cases and to keep the

- (ii) On or after 01/07/2010 and before or on 30/06/2013,
- (iii) On or after 01/07/2013 and before or on 31/12/2013,
- (iv) On or after 01/01/2014.

The regime in force of the time of the default continues to apply to the same case of continuous default.

- (CS.36) **Example 1:** If a debt was notified to the debtors in 2007, the rules of regime (i) continue to apply until today to that debt if the debtor(s) continue(s) to be in default.
- (CS.37) For all of the regimes (i)-(iv), the two week repo rate set by the Czech National Bank plays a role. Table 1 shows the development of this rate.

Table 1 - CNB annual repo rate

Date	Repo rate	Date	Repo rate	Date	Repo rate
8.12.1995	11,3	17.12.1997	14,75	1.8.2003	2
29.3.1996	11,5	20.3.1998	15	25.6.2004	2,25
29.4.1996	11,6	17.7.1998	14,5	27.8.2004	2,5
9.5.1996	11,8	14.8.1998	14	28.1.2005	2,25
21.6.1996	12,4	25.9.1998	13,5	1.4.2005	2
4.6.1997	39	27.10.1998	12,5	29.4.2005	1,75
11.6.1997	29	13.11.1998	11,5	31.10.2005	2
18.6.1997	25	4.12.1998	10,5	28.7.2006	2,25
20.6.1997	22	23.12.1998	9,5	29.9.2006	2,5
23.6.1997	20	18.1.1999	8,75	1.6.2007	2,75
24.6.1997	18,5	29.1.1999	8	27.7.2007	3
30.6.1997	18,2	12.3.1999	7,5	31.8.2007	3,25
1.7.1997	17,9	9.4.1999	7,2	30.11.2007	3,5
7.7.1997	17	4.5.1999	6,9	8.2.2008	3,75
8.7.1997	16,5	25.6.1999	6,5	8.8.2008	3,5
9.7.1997	16,2	30.7.1999	6,25	7.11.2008	2,75
16.7.1997	16	3.9.1999	6	18.12.2008	2,25
22.7.1997	15,7	5.10.1999	5,75	6.2.2009	1,75
23.7.1997	15,4	27.10.1999	5,5	11.5.2009	1,5
24.7.1997	15,2	26.11.1999	5,25	7.8.2009	1,25
28.7.1997	14,9	23.2.2001	5	17.12.2009	1
1.8.1997	14,7	27.7.2001	5,25	7.5.2010	0,75
4.8.1997	14,5	30.11.2001	4,75	29.6.2012	0,5
31.10.1997	14,8	22.1.2002	4,5	1.10.2012	0,25
1.12.1997	18,5	1.2.2002	4,25	2.11.2012	0,05
2.12.1997	18	26.4.2002	3,75		
3.12.1997	17,5	26.7.2002	3		
4.12.1997	16,75	1.11.2002	2,75		
9.12.1997	15,5	31.1.2003	2,5		
10.12.1997	15	26.6.2003	2,25		

(Contd.)

complexity of the explanations manageable, we do not treat cases of the notification occurring before 28/04/2005. It is relevant to mention however that according to Regulation of the Government no. 142/1994 Coll., sec. 1, for defaults that occurred from 15/07/1994 to 27/04/2005, the annual default interest rate was defined as twice the discount rate set by the Czech National Bank (hereinafter the "CNB") and it was valid for the first day of default. The rate remained the same for an initiated and lasting default, even if the discount rate changed afterwards.

(CS.38) For defaults occurring **on or after 28/04/2005 and before or on 30/06/2010**, the following regime (“regime (i)”) applies:

- a. **Setting of the default interest rate:** The default interest rate for every calendar half year is determined by the CNB repo rate that was in force on the first day of the calendar half year in which the default occurred, plus seven percentage points.<sup>308</sup>

Table 2 - Default interest rate under regime (i)

Starting day	Last day	Default interest rate
28.04.2005	30.06.2005	9.5%
01.07.2005	31.12.2005	8.75%
01.01.2006	30.06.2006	9.00%
01.07.2006	31.12.2006	9.00%
01.01.2007	30.06.2007	9.50%
01.07.2007	31.12.2007	9.75%
01.01.2008	30.06.2008	10.50%
01.07.2008	31.12.2008	10.75%
01.01.2009	30.06.2009	9.25%
01.07.2009	31.12.2009	8.50%
01.01.2010	30.06.2010	8.00%
01.07.2010	31.12.2010	7.75%
01.01.2011	30.06.2011	7.75%
01.07.2011	31.12.2011	7.75%
01.01.2012	30.06.2012	7.75%
01.07.2012	31.12.2012	7.50%
01.01.2013	30.06.2013	7.05%
01.07.2013	31.12.2013	7.05%
01.01.2014	30.06.2014	7.05%
01.07.2014	31.12.2014	7.05%
01.01.2015	current	7.05%

**b. Modalities of calculation**

Default interest calculation uses simple interest under all of the regimes (i)-(iv). Under regime (i), the rate employed for interest calculation concerning the same, continuous debt, changes as the default interest rate changes.

**Example 2:** The cartelists were notified on 30 June 2008 of the sum of 100 claimed from them by a victim of a cartel. Default interest starts to accrue on 1 July 2008. The default interest that has accrued until the end of 2014 is calculated as follows:

<sup>308</sup> Regulation of the Government no. 142/1994 Coll., as amended by Regulation no. 163/2005 Coll., sec. 1.: Výše úroků z prodlení odpovídá ročně výši repo sazby stanovené Českou národní bankou, zvýšené o sedm procentních bodů. V každém kalendářním pololetí, v němž trvá prodlení dlužníka, je výše úroků z prodlení závislá na výši repo sazby stanovené Českou národní bankou a platné pro první den příslušného kalendářního pololetí.

$$100*(0.1075*(184/366)+0.0925*(181/365)+0.085*(184/365)+0.08*(181/365)+0.0775*(184/365)+0.0775*(181/365)+0.0775*(184/365)+0.0775*(182/366)+0.075*(184/366)+0.0705*(181/365)+0.0705*(184/365)+0.0705*(181/365)+0.0705*(184/365))\approx 51.62$$

Note the difference to regimes (ii)-(iv), under which the rate employed for interest calculation concerning the same, continuous debt is held constant (see below).

(CS.39) For defaults occurring **on or after 01/07/2010 and before or on 30/06/2013**, the following regime (“regime (ii)”) applies:

- a. **Setting of the default interest rate:** The default interest rate is set on the basis of the CNB two week repo rate in force on the last day of the calendar half-year preceding the calendar half-year in which the default occurred, increased by seven percentage points.<sup>309</sup>

Table 3 - Default interest rates under regime (ii)

Starting day	Last day	Default interest rate
01.07.2010	31.12.2010	7.75%
01.01.2011	30.06.2011	7.75%
01.07.2011	31.12.2011	7.75%
01.01.2012	30.06.2012	7.75%
01.07.2012	31.12.2012	7.50%
01.01.2013	30.06.2013	7.05%
01.07.2013	31.12.2013	7.05%
01.01.2014	30.06.2014	7.05%
01.07.2014	31.12.2014	7.05%
01.01.2015	current	7.05%

- b. **Modalities of calculation:** Default interest calculation uses simple interest under all of the regimes (i)-(iv). Under regime (ii), the rate employed for interest calculation concerning the same, continuous debt stays fixed. It is determined according to Table 3 by the date of the default and stays constant.

**Example 3:** The cartelists were notified on 30 June 2012 of the sum of 100 claimed from them by a victim of a cartel. Default interest starts to accrue on 1 July 2012. The default interest that has accrued until the end of 2014 is calculated as follows:

$$100*(0.075*(184/366)+0.075*(181/365)+0.075*(184/365)+0.075*(181/365)+0.075*(184/365)) \\ =100*(0.075*(2+(92/183))) \\ \approx 18.77$$

Note that the rate of 7.5% is used for the entire calculation, even though Table 3 shows the default interest rate changing to 7.05 % at the beginning of 2013. But for any one debt, the

<sup>309</sup> Regulation of the Government no. 142/1994 Coll., as amended by Regulation no. 33/2010 Coll. sec. 1, in original: Výše úroku z prodlení odpovídá ročně výši repo sazby stanovené Českou národní bankou pro poslední den kalendářního pololetí, které předchází kalendářnímu pololetí, v němž došlo k prodlení, zvýšené o sedm procentních bodů.

rate is determined once by the date of default and then held constant. This is different to regime (i).

(CS.40) For defaults occurring **on or after 01/07/2013 and before or on 31/12/2013**, the following regime (“regime (iii)”) applies:

- c. **Setting of the default interest rate:** The default interest rate is set on the basis of the CNB two week repo rate in force on the last day of the calendar half-year preceding the calendar half-year in which the default occurred, increased by eight percentage points.<sup>310</sup>

Table 4 - Default interest rates under regime (iii)

Starting day	Last day	Default interest rate
01.07.2013	31.12.2013	8.05%
01.01.2014	30.06.2014	8.05%
01.07.2014	31.12.2014	8.05%
01.01.2015	current	8.05%

- d. **Modalities of calculation:** Default interest calculation uses simple interest under all of the regimes (i)-(iv). Under regime (iii), the rate employed for interest calculation concerning the same, continuous debt stays fixed. It is determined according to **Błąd! Nie można odnaleźć źródła odwołania.** by the date of the default and stays constant.

**Example 4:** The cartelists were notified on 30 June 2013 of the sum of 100 claimed from them by a victim of a cartel. Default interest starts to accrue on 1 July 2013. The default interest that has accrued until the end of 2014 is calculated as follows:

$$100 \cdot (0.0805 \cdot (184/365)) + 100 \cdot 0.0805 \approx 12,11$$

(CS.41) For defaults occurring **on or after 01/01/2014**, the following regime (“regime (iv)”) applies:

- e. **Setting of the default interest rate:** The default interest rate is set on the basis of the CNB two week repo rate in force on the first day of the calendar half-year in which the default occurred, increased by eight percentage points.<sup>311</sup>

<sup>310</sup> Regulation of the Government no. 142/1994 Coll., as amended by Regulation no. 180/2013 Coll., sec. 1, in original: Výše úroku z prodlení odpovídá ročně výši repo sazby stanovené Českou národní bankou pro poslední den kalendářního pololetí, které předchází kalendářnímu pololetí, v němž došlo k prodlení, zvýšené o osm procentních bodů. It is worth noting that the increase from seven percentage points to eight percentage points above the repo rate was made within the transposition of the Directive 2011/7/EU on combating late payment in commercial transactions. The Directive stipulates in Art. 2(6) that ‘statutory interest for late payment’ means simple interest for late payment at a rate which is equal to the sum of the reference rate and at least eight percentage points.

<sup>311</sup> Regulation of the Government no. 351/2013 Coll., sec. 2, in original: Výše úroku z prodlení odpovídá ročně výši repo sazby stanovené Českou národní bankou pro první den kalendářního pololetí, v němž došlo k prodlení, zvýšené o 8 procentních bodů.

Table 5 - Default interest rates under regime (iv)

Starting day	Last day	Default interest rate
01.07.2014	31.12.2014	8.05%
01.01.2015	current	8.05%

- f. **Modalities of calculation:** Default interest calculation uses simple interest under all of the regimes (i)-(iv). Under regime (iii), the rate employed for interest calculation concerning the same, continuous debt stays fixed. It is determined according to Table 5 by the date of the default and stays constant.

**Example 5:** The cartelists were notified on 30 June 2014 of the sum of 100 claimed from them by a victim of a cartel. Default interest starts to accrue on 1 July 2014. The default interest that has accrued until the end of 2014 is calculated as follows:

$$100 \cdot (0.0805 \cdot (184/365)) \approx 4.06$$

(CS.42) Note that calculations under regime (iii) and regime (iv) are similar. The only difference is that under regime (iii) the repo rate valid on **the last day of the half-year preceding the default** applies, while under regime (iv) the repo rate valid **on the first day of the half-year in which the default occurred** applies. In practice, the default interest rate is the same, because the repo rate has not changed since 2012.

(CS.43) It must be highlighted that the actual default interest rate is always determined by the regulation which was valid on the day when the accrual started (when the debt became due). The changes of the algorithm in the following regulations do not influence the calculation.

- a. **Please identify an official, reliable, publicly available source that publishes the pertinent legal interest rates as they change.**

(CS.44) As stated above, the algorithm for the calculation of the default interest rate is set by a regulation of the Government. The actual default interest rate is derived from the repo rate set by the Czech National Bank.

(CS.45) The Regulation of the Government is officially published in the Collection of Laws ("Coll.").

(CS.46) The repo rate is officially published in the Bulletin of the Czech National Bank. It is available online: <https://www.cnb.cz/cs/legislative/vestnik/>.

- b. **If interest rates change on a fixed schedule, please indicate the schedule.**

(CS.47) As explained above, default interest rate changes according to the changes of the algorithm set in the regulation and in relation to the changes of the repo rate set by the CNB. There is no fixed schedule.

(CS.48) The decision to change the regulation is at the discretion of the government. However, as it was noted above, the increase from seven percentage points to eight percentage points above the repo rate was imposed by the EU Directive 2011/7/EU.



(CS.49) The decision to change the repo rate is at the discretion of the CNB. The Board of the CNB discusses during its regular sessions whether it is necessary to change the repo rate or not. The currently applicable repo rate has not been changed since 02/11/2012.

c. **If part of the debt / the damage is being paid, how is interest calculated following that payment? In particular, do partial payments first cover interest or the principal amount? Is there any provision or legal practice similar to Art. 86(3)(2) of the rules of application of Regulation 966/2012 on the financial rules applicable to the general budget of the Union where it is stated that “Any partial payments shall first cover the interest”?**

(CS.50) The rules for payment are set in the Civil Code. As a matter of principle, partial payments first cover interest and then the principal amount.<sup>312</sup>

(CS.51) The debtor, however, may decide to pay the principal amount first. In that case, interest on interest must be paid.<sup>313</sup>

d. **Please calculate interest in the following hypothetical case. All dates are given in the format dd.mm.yyyy. All amounts are stated without specifying the currency to abstract from implications of the introduction of the common Euro currency. Assume that the claims have not been time barred. Assume that a national court in the Member State on which you are reporting has jurisdiction to rule on the case. Assume that the cartelists are jointly liable for the damage caused by the cartel. If results differ materially depending on whether accrual of interest is based purely on national law or made in compliance with the EU principle of full compensation, provide both calculations.**

**There was a long running pan-European cartel for a product that materially affected trade between Member States. The cartel lasted from the beginning of 1993 until the dawn raids (unannounced inspections) of the European Commission on 02.02.2009.**

**On 30.11.2010, a longtime customer of the cartel, who bought the cartelised product in the Member State on which you are reporting, brings a claim for damages against three cartelists (A, B, and C). All of the three defendants have their seat in the Member State on which you are reporting. The customer only bought the cartelised product of the cartelists A and B. In the writ, the claimant specifies the damages caused by the cartel and the date on which the respective damage occurred. The claimant also specifically requests that interest be paid on the damages. The damages (always = 100) and respective dates are set out in Table 2 below. Should a subjective rate be of relevance, you will find the ROI (Return On Investment) rates of the claimant and the three defendants in Table 3 below. You will also find the average interest rate that the claimant had to pay on credit taken out in that year (claimant’s average refinance rate).**

**On 26.11.2013 a court renders a final judgment, ordering the defendant(s) to pay damages and interest. The defendants take until 12.02.2014 to pay. Please specify the**

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<sup>312</sup> Sec. 1932(1) CC. In original: Má-li dlužník plnit na jistinu, úroky a náklady spojené s uplatněním pohledávky, započte se plnění nejprve na náklady již určené, pak na úroky z prodlení, poté na úroky a nakonec na jistinu, ledaže dlužník projeví při plnění jinou vůli. ENG: If the debtor has to pay the principal amount, interest and costs associated with the application of the claim, the payment first covers the already identified costs, then default interest, then interest and the principal amount in the end, unless the debtor decides to pay it otherwise.

<sup>313</sup> Sec. 1932(2) CC. In original: Určí-li dlužník, že plní nejprve na jistinu, úročí se náklady i úroky. ENG: If the debtor determines that he fulfils the principal amount first, then interest on costs and interest on interest shall be paid.

**total amount the jointly liable defendants have to pay on 12.02.2014 in order to relinquish their debt towards the claimant.**

Table 6 - Damage Amounts and Dates

Date the Damage Occurred	Damage Amount
15/11/1993	100
17/09/1996	100
22/02/2006	100
12/08/2008	100

Table 7 - Refinance and Return on Investment Rates

Year	Claimant's Refinance Rate	Claimant's Annual ROI	Defendant's A Annual ROI	Defendant's B Annual ROI	Defendant's C Annual ROI
1993	6.00%	5.50%	4.00%	4.00%	3.00%
1994	6.00%	9.80%	4.00%	4.00%	4.00%
1995	6.00%	9.50%	4.00%	4.00%	5.00%
1996	6.00%	1.00%	0.00%	0.00%	0.00%
1997	8.00%	-3.80%	1.00%	1.00%	3.00%
1998	8.00%	1.10%	4.00%	4.00%	5.00%
1999	8.00%	2.80%	1.00%	1.00%	3.00%
2000	8.00%	1.10%	-2.00%	-1.00%	0.00%
2001	8.00%	4.51%	2.00%	2.00%	3.00%
2002	8.00%	5.30%	4.00%	4.00%	5.00%
2003	8.00%	8.21%	9.00%	9.00%	9.00%
2004	7.00%	9.00%	3.00%	3.00%	2.00%
2005	7.00%	10.00%	1.00%	1.00%	1.00%
2006	7.00%	6.00%	1.00%	1.00%	1.00%
2007	5.00%	-5.00%	4.00%	4.00%	2.00%
2008	5.00%	-7.00%	-1.00%	0.00%	0.00%
2009	5.00%	-5.00%	2.00%	2.00%	4.00%
2010	5.00%	-3.00%	4.00%	4.00%	4.00%
2011	5.00%	-2.70%	4.00%	4.00%	2.00%
2012	5.00%	1.61%	-2.00%	-1.00%	0.00%
2013	5.00%	4.40%	8.00%	8.00%	7.00%
2014	5.00%	1.41%	-4.00%	-3.00%	-1.00%

(CS.52) As explained above, the Czech law contains only provisions on general interest which is applicable in contractual relations, and default interest which is applicable when the debtor is in delay with payment stemming either from a contractual relationship or from tort. Therefore in damages claims, only default interest is explicitly anticipated and it starts accruing from the moment the monetary debt is due, i. e. on the day after the day when the debtor was asked to pay damages.

(CS.53) The debtor may be asked to pay by a pre-trial request or by an action submitted at the court (in both cases, the starting date is derived from the time the request was actually delivered to the debtor). If only default interest applies, the case may be resolved in different ways depending

on whether the plaintiff made a pre-trial request or not. However, the plaintiff may try to claim full compensation and require “interest” accruing from the time the harm occurred. In such a case, the plaintiff must prove the amount interest because the Czech law does not anticipate such a category.

- (CS.54) The following are four different scenarios how the given hypothetical case may be resolved. The first and second scenarios deal with a case where only the main damage + default interest are calculated. The first scenario is based on a pre-trial request, in the second scenario, the debtor is asked to pay by an action submitted at the court. The third and the fourth scenario offer a hypothetical case where the plaintiff claims full compensation by calculating interest as a part of loss of profit + default interest. In the third scenario, default interest starts accruing when the debtor is informed by a pre-trial request. In the fourth scenario, the debtor is informed to pay by a submitted plea.
- (CS.55) First scenario: Let us assume that the customer asked the cartelists to pay in a pre-trial request which was delivered to the cartelists already on 02/02/2009. In such a case, the default interest starts accruing on 03/02/2009 and ends on 12/02/2014.
- (CS.56) According to the Regulation of the Government which was in force on the date of the request<sup>314</sup>, the default interest rate corresponds annually to the repo rate set by the CNB, increased by seven percentage points. In each calendar half-year for which the default of the debtor lasts, the default interest rate depends on the repo rate set by the CNB and valid for the first day of the respective calendar half-year.
- (CS.57) The repo rate changed in the respective period in a following way:

Table 8 – Repo Rate and Default Interest Rate in the relevant period

Date	Repo rate set by the CNB	Default Interest rate
18/12/2008	2.25%	9.25%
06/02/2009	1.75%	8.75%
11/05/2009	1.50%	8.5%
07/08/2009	1.25%	8.25%
17/12/2009	1.00%	8.00%
07/05/2010	0.75%	7.75%
29/06/2012	0.50%	7.50%
01/10/2012	0.25%	7.25%
02/11/2012	0.05%	7.05%

- (CS.58) The default interest rate and the interest for each respective period in the given hypothetical scenario 1 are as follows. The calculations are done with a precision of two decimal places.

Table 9 - Hypothetical Case 1

From	To	Amount	Interest Rate	Total Days	Days in a Year	Interest
03/02/2009	30/06/2009	400	9.25%	148	365	15
01/07/2009	31/12/2009	400	8.50%	184	365	17.14
01/01/2010	30/06/2010	400	8.00%	181	365	15.87
01/07/2010	31/12/2010	400	7.75%	184	365	15.63

<sup>314</sup> Regulation of the Government no. 142/1994 Coll., as amended by Regulation no. 163/2005 Coll.

01/01/2011	30/06/2011	400	7.75%	181	365	15.37
01/07/2011	31/12/2011	400	7.75%	184	365	15.63
01/01/2012	30/06/2012	400	7.75%	182	366	15.42
01/07/2012	31/12/2012	400	7.50%	184	366	15.08
01/01/2013	30/06/2013	400	7.05%	181	365	13.98
01/07/2013	31/12/2013	400	7.05%	184	365	14.22
01/01/2014	12/02/2014	400	7.05%	43	365	3.32
						<b>156.66</b>

(CS.59) In the case in which the plaintiff makes a pre-trial request on 02/02/2009, the total sum due by debtors on 12/02/2014 is 556.66.

(CS.60) Second scenario: If the pre-trial request was not made (which is in practice not very usual), the default interest starts accruing from the first day after the copy of the plea is delivered to the defendants.<sup>315</sup> In practice, it takes up to one month until the court delivers the copy of the plea to defendants. However, for ease of presentation of the hypothetical case, let us assume that the copy of the plea was delivered to defendants on the same day it was submitted at the court (30/11/2010). Thus the accrual time starts on 01/12/2010 and ends on 12/02/2014.

(CS.61) According to the Regulation of the Government which was in force on the date of submission,<sup>316</sup> the default interest rate corresponds annually to the repo rate set by the CNB for the last day of the calendar half-year preceding the calendar half-year in which the default occurred, increased by 7 percentage points. The repo rate valid on 30 June 2010 was 0.75%; therefore the default interest rate applicable on 30/11/2010 is 7.75%.

(CS.62) According to the Regulation, the default interest rate remains the same for the whole period of default, i.e. 7.75% annually.

(CS.63) The default interest rate and the interest for each respective period in the given hypothetical scenario 2 are as follows. The calculations are done with a precision of two decimal places.

Table 10 - Hypothetical Case 2

From	To	Amount	Interest Rate	Total Days	Days in a Year	Interest
01/12/2010	31/12/2010	400.00	7.75%	31	365	2.63
01/01/2011	31/12/2011	400.00	7.75%	365	365	31
01/01/2012	31/12/2012	400.00	7.75%	366	366	31
01/01/2013	31/12/2013	400.00	7.75%	365	365	31
01/01/2014	12/02/2014	400.00	7.75%	43	365	3.65
						<b>99.28</b>

(CS.64) For the case where debtors are firstly asked to pay due to an actual action submitted at a court, the overall sum due by the debtors on 12/02/2014 is 499.28.

<sup>315</sup> It is quite a complex issue of joint and several liability. In practice, the default interest rate starts accruing for each defendant individually according to when each of them was informed. If the accrual starts earlier for one of the defendants, such a defendant is responsible alone for interest occurred before the accrual starts for the others. For ease of presentation, let us assume that all defendants receive the copy of the plea on the same day.

<sup>316</sup> Regulation of the Government no. 142/1994 Coll., as amended by Regulation no. 33/2010 Coll.

- (CS.65) The first scenario shows the maximum amount of 556.66 which is owed by the debtors if the pre-trial request is sent just after the dawn raids. The second scenario shows the amount of 499.28 in case that no pre-trial request is sent at all.
- (CS.66) Third scenario: If the plaintiff wants to claim full compensation, i. e. “interest” which starts accruing from the time the harm occurred, the plaintiff may try to claim such “interest” as a part of the loss of profit (Let us call it “loss of interest”). In such case, the plaintiff has to calculate the overall sum of money that the plaintiff was not able to gain due to the fact that the plaintiff had not had the main amount of money at disposal. It must be noted that there is no case law determining which “interest rate” must be applied in damages claims, and it is not sure whether the Czech courts would be willing to accept the calculation provided by the plaintiff. Therefore the following considerations are very hypothetical.
- (CS.67) It may be assumed that the calculation must be individualized. The plaintiff must prove that it was objectively possible to gain a certain amount of interest if the cartel damage had not occurred. In the above mentioned case no. 25 Cdo 4563/2009, the plaintiff had to withdraw money from his term deposit to recover damage (in that case the damage occurred due to breach of contract). Therefore he successfully claimed “loss of interest” in the amount of the term deposit rate. By analogy, our hypothetical plaintiff could try to apply loss of interest caused by the fact that the main amount had not been able to be put on a deposit account. Or alternatively, the plaintiff may apply an interest rate which applies for a bank loan which was necessary because financial resources were lowered by the cartel overcharge. Another alternative would be to employ an “interest rate” that corresponds to the inflation rate. Presumably, the rate of default interest, discussed above, is itself not suitable because it is rather high, as it includes the price for money and a punitive part which motivates the debtor to pay as sooner as possible. However, using the two week CNB repo rate that is the basis for the default interest rate (see above), but without adding seven or eight percentage points, seems a conceivable method. The repo rate is a rate at which banks can themselves get liquidity from the central bank against the deposition of securities.<sup>317</sup> For their credit contracts with consumers and businesses, banks will then demand a premium on the repo rate, with the magnitude of the premium depending on the perceived risk and the collateral that is securing the credit. Using the CNB repo rate therefore provides a general lower bound estimate of borrowing costs over time. Using the repo rate is thus a conservative version of the mechanism that Section 1802 CC stipulates for general interest in cases where no rate was agreed between the parties.
- (CS.68) For the ease of presentation of our hypothetical case, let us calculate with the “interest rate” in the amount of the return on investment of the plaintiff. Such “interest” starts accruing for each damage respectively. Then let us assume that the plaintiff sends a pre-trial request on 02/02/2009. On 03/02/2009, default interest starts accruing and is calculated from the overall sum (the main amount + “loss of interest”).
- (CS.69) The tables for the calculation of “loss of interest” for each respective damage are in the appendix. The plaintiff claims damages in the total amount of 453,59 plus default interest. Then the calculation for the additional default interest is as follows.

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<sup>317</sup> Such open market operations are the main tool of the monetary policy of the CNB in accordance with sec. 2(2)a) Act no. 6/1993 Coll, on the Czech National Bank.

Table 11 - Hypothetical Case 3

From	To	Amount	Interest Rate	Total Days	Days in a Year	Interest
03/02/2009	30/06/2009	453,59	9.25%	148	365	17,01273
01/07/2009	31/12/2009	453,59	8.50%	184	365	19,43602
01/01/2010	30/06/2010	453,59	8.00%	181	365	17,99447
01/07/2010	31/12/2010	453,59	7.75%	184	365	17,72108
01/01/2011	30/06/2011	453,59	7.75%	181	365	17,43215
01/07/2011	31/12/2011	453,59	7.75%	184	365	17,72108
01/01/2012	30/06/2012	453,59	7.75%	182	366	17,48057
01/07/2012	31/12/2012	453,59	7.50%	184	366	17,10257
01/01/2013	30/06/2013	453,59	7.05%	181	365	15,85763
01/07/2013	31/12/2013	453,59	7.05%	184	365	16,12046
01/01/2014	12/02/2014	453,59	7.05%	43	365	3,767282
						<b>177,646</b>

(CS.70) The overall sum due by the debtors on 12/02/2014 in the third scenario is 631,24.

(CS.71) The fourth scenario: Let us assume the same situation as in the third scenario with the exception that the debtor is first asked to by the submitted plea on 30/11/2010. The calculation is the same as in the second scenario, only the original amount is increased by loss of interest and it makes 453,59. Therefore the table on the calculation of the additional default interest looks as follows.

Table 12 - Hypothetical Case 4

From	To	Amount	Interest Rate	Total Days	Days in a Year	Interest
01/12/2010	31/12/2010	453,59	7.75%	31	365	2,985616
01/01/2011	31/12/2011	453,59	7.75%	365	365	35,15323
01/01/2012	31/12/2012	453,59	7.75%	366	366	35,15323
01/01/2013	31/12/2013	453,59	7.75%	365	365	35,15323
01/01/2014	12/02/2014	453,59	7.75%	43	365	4,141339
						<b>112,59</b>

(CS.72) In the fourth scenario, the overall sum due by the debtors on 12/02/2014 is 566,18.

### ***Section III. Procedural Aspects***

**3.1. What are the procedures for the party seeking to receive interest on the damages paid? (e.g. does the claimant have to make a separate plea for the interest payments and if so, what information and evidence must be supplied? Does the judge award interest *ex officio* or does the claimant have to request it?).**

(CS.73) Default interest must always be explicitly claimed; otherwise the court cannot award it, since it cannot go beyond the claim. The interest may be claimed as a part of the main action, or in a separate plea.

(CS.74) When the accrual starts on the day the plea is delivered to the defendant, the plaintiff does not have to supply any special evidence regarding the interest. The plaintiff bears the burden of proof only regarding the principal amount. However, if the debtor has been asked to pay beforehand, and the plaintiff claims interest to be calculated from an earlier date, the plaintiff must prove that the request to pay was actually delivered to the defendant.

(CS.75) When the plaintiff claims the “loss of interest”, she must claim it as part of the main action (loss of profit) and must bear a burden of proof thereof. In other words, she must prove that she could gain a respective sum of money if she had had the main amount of money at her disposal.

**3.2. Can the judge award a higher interest amount than requested by the claimant or does the principle of *ne ultra petita* apply?**

(CS.76) The principle of *ne ultra petita* applies. The court awards default interest only if it is claimed by the plaintiff. The amount of default interest is calculated according to the statutory provisions, unless agreed differently among parties. The same principle applies to “loss of interest”. The court cannot awards it unless the plaintiff explicitly claims it.

**3.3. Can the judge estimate interest or does interest always have to be calculated?**

(CS.77) The judge does not determine the actual amount of default interest. The judgment only specifies how the rate should be calculated. The court usually indicates only the default interest rate and determines the starting day of the accrual. The accrual ends just on the day of the actual payment.

(CS.78) In case of “loss of interest”, the court cannot go beyond the plea. The calculation of the interest must be made by the plaintiff.

**3.4. If the claimant changes the request regarding the interest, is this regarded as an amendment of the pleadings? Is this only possible until a certain stage into the proceedings and precluded later on or can the claimant make such changes without negative procedural consequences at any time up to the judgment?**

(CS.79) The change of the request in relation to interest will be regarded as an amendment of the pleadings. As a matter of principle, the plaintiff may change the plea anytime before the final judgment is issued if the court agrees upon it.<sup>318</sup> The court refuses to accept the amendment only if results of the pending proceedings could not serve as a basis for the proceedings on the amended plea.<sup>319</sup>

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<sup>318</sup> Sec. 95(1) of the Code of Civil Procedure no. 99/1963 Coll. In original: Žalobce (navrhovatel) může za řízení se souhlasem soudu měnit návrh na zahájení řízení. Změněný návrh je třeba ostatním účastníkům doručit do vlastních rukou, pokud nebyli přítomni jednání, při němž ke změně došlo. ENG: Subject to the consent of the court, the plaintiff may amend the petition to commence proceedings. The amended petition shall be delivered to all other parties who did not attend the hearing at which the amendment was made.

<sup>319</sup> Sec. 95(2) of the Code of Civil Procedure. In original: Soud nepřipustí změnu návrhu, jestliže by výsledky dosavadního řízení nemohly být podkladem pro řízení o změněném návrhu. V takovém případě pokračuje soud v řízení o původním návrhu po právní moci usnesení. ENG: The court shall not allow amendment of the petition if the results of the pending proceedings could not serve as a basis for the proceedings on the amended plea. In such a case, the court shall continue in proceedings on the original petition after the order (rejecting the amendment) becomes effective.

#### ***Section IV. Specific instances***

**4.1. Identify any cases relating to damages claims for infringements of competition law and explain how interest was calculated. In writing these summaries, provide all relevant information about how interest and other compensation for the effluxion of time was calculated.**

(CS.80) In the Czech Republic, there are only few private enforcement cases in competition law. There are no official statistics; the number of all cases is estimated to be less than 15. All those cases dealt with abuse of dominance.

(CS.81) Some cases were settled out of the court and there are several cases still pending. No case has ever reached a civil law judgment where damages would be awarded. Therefore there is no decided case which would deal also with interest.

(CS.82) There are at least three large scale stand-alone cases brought against O2 Czech Republic, a telecom incumbent. Its competitors claim damages in the amount of billions CZK due to the alleged abuse of dominance (margin squeeze and refusal to supply). According to available information, all cases are suspended until the Czech Competition Authority ends its investigation.

**4.2. Are the rules on the award of interest specific to the kinds of claim or general principles? Are there any specific approaches/rules that you can identify in national or EU competition cases, or in other cases where the claim is brought by business against business (B2B) and are there any specific approaches/rules in business versus consumer (B2C) cases?**

(CS.83) The Czech legal system does not provide any specific rules concerning the award of interest in cases resulting from infringement of competition law. The Civil Code just confirms that a person who suffer damages due to infringements of competition law has rights set by the law, such as the right to claim damages (sections 2990 and 2988 CC). Concerning the procedure, the general principles on damage claims apply.

(CS.84) The law does not differentiate between B2B and B2C cases.<sup>320</sup>

#### ***Section V. Evaluation, Interpretation in conformity with EU Law, and Intertemporal Aspect***

**5.1. Throughout the reports, evaluate how satisfactory are the rules on the calculation of interest perceived to be? In considering this question, identify any law reform proposals in the last 15 years or so, or any major judgments by the higher courts that call into question or change some of the issues pertaining to the award of damages. Please identify changes of relevant national law on interest that will come into force or are currently considered.**

(CS.85) The Czech legal provisions on the calculation of default interest seem to be constant during the relevant period. The regulations of the Government have changed only the algorithm of how default interest should be calculated (see above). The time of accrual remains the same and there is no indication that the law might change in the near future.

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<sup>320</sup> Under the old legislation, B2B cases were governed by the Commercial Code as a special act together with the Civil Code as *lex generalis*. B2C cases were governed just by the Civil Code. However, this dichotomy did not influence the question of default interest.



- (CS.86) The Czech law still awards default interest from the date the debtor was asked to pay damages, either by a direct requirement or by submitting a plea. This principle stems from constant case law (RIII/1967, R 23/1993, R 27/1977, R 28/1984) and has been confirmed even recently, e. g. by judgment of the Supreme Court issued on 23/09/2009, no. 25 Cdo 2417/2007. The Supreme Court ruled: *“The person responsible for damages (a debtor in a liability relationship) gets into default in payment, in principle, if she does not satisfy the debt the day after she was asked by the creditor (harmed person) to fulfil the requirement; since that day the creditor may require default interest. Unless the debtor was asked earlier, a plea is considered to be a qualified call for fulfilment; the default in payment begins the day after the plea was delivered to the defendant.”*
- (CS.87) However, in practice, plaintiffs almost always send a pre-trial request. They are motivated to do so mainly because of sec. 142a CCP which stipulates that reimbursement of costs of proceedings may be granted only if the plaintiff has sent a pre-trial request to the defendant at least 7 days before submitting a plea at the court. The court may grant the reimbursement of costs even in the absence of the pre-trial request, but only in exceptional cases.<sup>321</sup>
- (CS.88) When it comes to “loss of interest”, the Czech law does not provide any guidelines how to calculate it. The question how to transpose the “full time compensation” principle from the Directive 2014/104/EU is still under consideration, but it may be presumed that the Czech law will include a specific provision for special “interest” which starts accruing on the moment when the cartel damage occurred.

**5.2. For each question, where it is relevant, assess the compliance of the national interest rules with the minimum standard prescribed by EU law (‘full compensation’). If national law does not grant full compensation, please try to identify an interpretation of national law that guarantees full compensation in conformity with European law.**

- (CS.89) The Czech legal order is not in compliance with the requirement to full compensation. The only kind of interest that the Czech law explicitly provides for in damages claims is default interest and default interest is not calculated from the time the harm occurred, but it is calculated from the day the debtor was asked to pay (see answer to question 5.1. above).
- (CS.90) It is still not known how the requirement of the Directive 2014/104/EU will be implemented into the Czech legal order. The legislation which would apply the directive has not been even drafted yet.<sup>322</sup>
- (CS.91) The only way plaintiffs could reach the full compensation including interest accruing from the occurrence of the harm would be to calculate and present such interest as a part of *lucrum cessans* (see the explanation under question 2.5 d) ). In such a case, the plaintiff should claim “loss of interest” and calculate the rate of interest. However, Czech courts might not accept it under the current legislation.
- (CS.92) In any event, the applicable default interest rate according to the Czech legislation seems to be relatively high, which, in practice, may compensate the short accrual period.

**5.3. Finally, when assessing the overall compliance of national law with the principle of full compensation based on directly applicable EU law, please confirm that national courts**

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<sup>321</sup> Sec. 142a(2) CCP.

<sup>322</sup> Confirmed by the responsible person at the Czech Competition Authority.

**have to apply it also in relation to past infringements of EU competition law or the equivalent provisions of the EEA agreement (e.g. cartels starting in the 1990ies and ending in the 2000er years).**

- (CS.93) Under the current legislation, the courts may grant default interest accruing from the maturity of the monetary debt. The debt rising from damages becomes mature when the debtor is asked to pay. The courts may not grant default interest accruing from an earlier moment.
- (CS.94) Since the Czech law does not explicitly provide for any other kind of interest in damages claims, it is up to the plaintiff to try to include “loss of interest” into the loss of profit. However, there is still a risk that the Czech courts might not accept it because there is no explicit statutory basis and still no case law for it. In such a case, the plaintiff may try to persuade the court to submit a preliminary reference to the CJEU.

**5.4. Regarding the secondary subject of investigation (interest on damages due to infringements of national competition law only) Recital 12 of the preamble of Directive 2014/104/EU summarises the EU law principles regarding interest as follows:**

**“Anyone who has suffered harm caused by an infringement can claim compensation for the actual loss (*damnum emergens*), for the gain of which he has been deprived (*loss of profit* or *lucrum cessans*) plus interest. This is irrespective of whether the national rules define these categories separately or in combination. The payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time, and it should be due from the time the harm occurred until compensation is paid, without prejudice to the qualification of such interest as compensatory or default interest under national law. This is also without prejudice to whether effluxion of time is taken into account as a separate category (interest) or as a constituent part of actual loss of profit. It is incumbent on the Member States to lay down the rules to be applied for that purpose”.**

**Would the right to full compensation as set out by Recital 12 of the proposed directive apply to interest calculation for damages in cases where only national competition law has been infringed and the damage occurred before the implementation of the directive came into force?**

- (CS.95) Under the current legislation, the accrual of interest is the same even for cases where only national competition law has been infringed. Even in such a case, the plaintiff may try to include the “loss of interest” into the loss of profit. However, the chance that the a Czech court might not accept by arguing that there is no statutory basis for it and the court is not obliged to follow EU law principles is not negligible.

**Appendix 1: Calculation of “loss of interest” according to the ROI of the claimant****Damage 1**

From	To	Amount	Interest Rate	Total Days	Interest	Days in Year
15.11.1993	31.12.1993	100,00	5,50%	47	0,69	365
1.1.1994	31.12.1994	100,69	9,80%	365	9,87	365
1.1.1995	31.12.1995	110,56	9,50%	365	10,50	365
1.1.1996	31.12.1996	121,06	1,00%	366	1,21	366
1.1.1997	31.12.1997	122,27	-3,80%	365	-4,65	365
1.1.1998	31.12.1998	117,63	1,10%	365	1,29	365
1.1.1999	31.12.1999	118,92	2,80%	365	3,33	365
1.1.2000	31.12.2000	122,25	1,10%	366	1,34	366
1.1.2001	31.12.2001	123,60	4,51%	365	5,57	365
1.1.2002	31.12.2002	129,17	5,30%	365	6,85	365
1.1.2003	31.12.2003	136,02	8,21%	365	11,17	365
1.1.2004	31.12.2004	147,18	9,00%	366	13,25	366
1.1.2005	31.12.2005	160,43	10,00%	365	16,04	365
1.1.2006	31.12.2006	176,47	6,00%	365	10,59	365
1.1.2007	31.12.2007	187,06	-5,00%	365	-9,35	365
1.1.2008	31.12.2008	177,71	-7,00%	366	-12,44	366
1.1.2009	31.12.2009	165,27	-5,00%	365	-8,26	365
1.1.2010	29.11.2010	157,00	-3,00%	333	-4,30	365
					<b>52,70</b>	
					<b>152,70</b>	

**Damage 2**

From	To	Amount	Interest Rate	Total Days	Interest	Days in Year
17.9.1996	31.12.1996	100,00	1,00%	106	0,29	366
1.1.1997	31.12.1997	100,29	-3,80%	365	-3,81	365
1.1.1998	31.12.1998	96,48	1,10%	365	1,06	365
1.1.1999	31.12.1999	97,54	2,80%	365	2,73	365
1.1.2000	31.12.2000	100,27	1,10%	366	1,10	366
1.1.2001	31.12.2001	101,37	4,51%	365	4,57	365
1.1.2002	31.12.2002	105,94	5,30%	365	5,62	365
1.1.2003	31.12.2003	111,56	8,21%	365	9,16	365
1.1.2004	31.12.2004	120,72	9,00%	366	10,86	366
1.1.2005	31.12.2005	131,58	10,00%	365	13,16	365
1.1.2006	31.12.2006	144,74	6,00%	365	8,68	365

*Belgium*

1.1.2007	31.12.2007	153,43	-5,00%	365	-7,67	365
1.1.2008	31.12.2008	145,76	-7,00%	366	-10,20	366
1.1.2009	31.12.2009	135,55	-5,00%	365	-6,78	365
1.1.2010	29.11.2010	128,77	-3,00%	333	-3,53	365
					<b>25,25</b>	

**125,25**

**Damage 3**

From	To	Amount	Interest Rate	Total Days	Interest	Days in Year
22.2.2006	31.12.2006	100,00	6,00%	313	5,12	365
1.1.2007	31.12.2007	105,12	-5,00%	365	-5,26	365
1.1.2008	31.12.2008	99,87	-7,00%	366	-6,99	366
1.1.2009	31.12.2009	92,88	-5,00%	365	-4,64	365
1.1.2010	29.11.2010	88,23	-3,00%	333	-2,42	365
					-14,19	

**85,81**

**Damage 4**

From	To	Amount	Interest Rate	Total Days	Interest	Days in Year
12.8.2008	31.12.2008	100,00	-7,00%	142	-2,78	366
1.1.2009	31.12.2009	97,22	-5,00%	365	-4,86	365
1.1.2010	29.11.2010	92,36	-3,00%	333	-2,53	365
					-10,17	

**89,83**

Total **453,59**



## Finland

Katri Havu\*

### *Preliminary Matters*

- (FI.1) Under Finnish law, there are three potentially relevant types of interest. They are all governed by general law on interest instead of being specific to damages due to restrictions of competition. The three relevant types are ‘actual interest’ (also referred to as ‘interest’, in Finnish *varsinainen korko*, or simply *korko*), ‘profit interest’ (*tuottokorko*) and ‘interest for late payment’<sup>323</sup> (*viivästyskorko*). Actual interest and interest for late payment are governed by the Finnish Interest Act (633/1982<sup>324</sup>, ‘Interest Act’, in Finnish *Korkolaki*).

### *Part I. General principles*

#### **1.1. What is interest? Is there a definition?**

- (FI.2) On the basis of the Act and its preparatory works, *actual interest* is interest that accrues before the due date of a monetary debt (Sections 1 and 3).<sup>325</sup> This interest may be understood as compensation for allowing somebody else to have one’s monetary assets at their disposal.<sup>326</sup> *Interest for late payment* is interest which accrues after a monetary debt is due (Sections 1 and 4).<sup>327</sup> Interest for late payment may be regarded as a sanction in addition to its compensatory nature.<sup>328</sup> Regardless of these notes, the Interest Act does not exhaustively define actual interest, interest or interest for late payment.<sup>329</sup> *Profit interest* is, roughly, interest that is paid to compensate for the loss of (investment) profit during a time somebody did not have their money at their disposal (but the principal sum is later returned to rectify the situation).<sup>330</sup> Profit interest may be described as a subtype of actual interest, but in its generally applicable role it is not based on written legislation and such interest is explicitly excluded from the scope of the Interest Act.<sup>331</sup> The obligation to pay profit interest is often described as a general legal principle which is visible in several Supreme Court decisions and which is also reflected by

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<sup>323</sup> Sometimes translated as ‘penalty interest (on overdue payment)’.

<sup>324</sup> The Finnish Act numbers indicate the year the Act was enacted but often the Act has been amended several times since the relevant year. Thus, the year in the Act number does not indicate the last time the legislation was changed.

<sup>325</sup> As to the preparatory works, see HE 109/1981 vp, for instance, 1–4.

<sup>326</sup> See also the preparatory works HE 109/1981 vp, 1–4; T. Wilhelmsson – L. Sevón, *Korkolaki ja viivästyskorko* (‘Interest Act and Interest for Late Payment’) 1984, 20.

<sup>327</sup> As to the preparatory works, see HE 109/1981 vp, 1–4.

<sup>328</sup> See the preparatory works HE 109/1981 vp, for instance, 3. See also Wilhelmsson – Sevón 1984, 20–21.

<sup>329</sup> As to possible definitions, see also Wilhelmsson – Sevón 1984, 18–21.

<sup>330</sup> The applicable rate of profit interest is partially unclear under the Finnish law. The claimant’s rate of profit may truly affect the interest rate but the compensatory effect may also take place through assumptions on an approximate amount of loss of interest.

<sup>331</sup> See Interest Act, Section 1(2)(4), according to which the Act does not apply to ‘an obligation to refund compensation or benefit received when a contract is annulled or the benefit proves to be unfounded, in so far as paying interest prior to the due date of the debt is concerned’.

numerous particular provisions in specific legislation.<sup>332</sup> In any case, the exact triggering conditions are not completely clear. Thus, whether the obligation to pay profit interest arises may be uncertain. Due to its nature as a principle, the definition of profit interest is to some extent open.

**1.2. When, and under what conditions, is interest payable at all? Does this depend on whether the claim is brought in tort, breach of contract or (where applicable) restitution/unjust enrichment?**

- (FI.3) The definitions above already to some extent indicate under what conditions interest is payable. In addition to the answer above, it should be stated that *actual interest* is payable when contractually agreed upon or, for instance, when the obligation may be considered to follow from applicable business practice. Under the Interest Act, the presumption is that the debtor is not liable to pay interest for the time preceding the due date of a debt.<sup>333</sup>
- (FI.4) *Interest for late payment* is payable in a damages compensation or comparable context when the general conditions for interest for late payment are fulfilled. According to the Interest Act, if payment of a debt is delayed, the debtor must pay interest for late payment on the delayed amount (Section 4(1)). The relevance of interest for late payment from the point of view of this study is illustrated by the specific rules relating to the damages compensation context and to claims for payment presented during court proceedings: Interest for late payment for compensation of damages or a corresponding debt, the grounds for and the amount of which require a specific investigation<sup>334</sup>, must be paid when 30 days have passed from the date on which the creditor presented the claim and provided information on the grounds for and the amount of compensation that can reasonably be required.<sup>335</sup> If the information is insufficient with regard to the amount of the debt, interest for late payment must nevertheless be paid for

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<sup>332</sup> As to case law, see, for instance, the Supreme Court judgments KKO 1991:3; KKO 1992:150; KKO 2002:44; KKO 2003:48; KKO 2005:69. As an example of specific provisions, see as probably the most important: Section 65 of the Sale of Goods Act (355/1987, *Kauppalaki* in Finnish). According to the provision, if a sales contract is void and the goods returned 'the buyer must account to the seller for any yield he has derived from the goods as well as pay reasonable compensation for any other benefit he may have derived from the goods.' Moreover, if the seller is to refund the price, he must pay interest on the amount to be refunded in accordance with Section 3(2) of the Interest Act from the date on which he received the payment. The Sale of Goods Act is generally thought to reflect and express general civil law principles. As regards literature on profit interest as a generally applicable legal principle, see O. Norros, *Velvoiteoikeus* ('Law of Obligations') 2012, 169–177.

<sup>333</sup> Section 3(1), also see the other Part I answers below.

<sup>334</sup> This is how the relevant provision describes the debt in question. It means that the debt is not clear as to, for instance, its amount. The underlying idea is that debts of this type necessitate particular rules on interest.

<sup>335</sup> The claim must be formulated so that the basis for the claim and some kind of estimate on the amount of the debt may be concluded from the claim. The quantification of the harm does not have to be final and precise. The evaluation as to fulfilling the requirements is made *in casu*. See also the preparatory works HE 109/1981 vp, 21. According to the relevant provision (Section 7(1)), the debtor's possibilities to obtain such information are also taken into account here. This means that the level of detail that the claimant needs to provide to "present" the claim *in a way that triggers the obligation to pay interest* also depends on how easy it is for the debtor to obtain such information. It suggests that if the debtor can easily obtain the information necessary to identify the grounds and amount of the claim, the claimant's obligation is less extensive. There are no precedents nor other clear stand as to what kind of information the claimant must provide in litigation concerning damages caused by a cartel in order to present the claim in a way that triggers the interest for late payment obligation of the debtor. The evaluation is made *in casu*. If a public enforcement decision has already found against the relevant cartel, it is possible that it is enough to present (in a detailed way) the facts relating to having been affected by the cartel, for instance, purchase contracts with cartel members, an elaborated estimation on the harm sustained and the remark that due to the nature of damage caused by a cartel, the amount of harm is estimated and cannot be presented precisely by the claimant. It is wise to remark that the defendant is better placed to assess the amount of harm and effects of the cartel.

the part of the debt that can reasonably be found to be established (Section 7(1)). Interest for late payment must be paid and starts accruing, at the latest, from the date on which a summons concerning payment of the debt was served on the debtor or, if the claim is presented during court proceedings, from the date on which the claim was presented (Section 9). In the competition restriction context, the point of time when interest starts to accrue may be difficult to determine. It is also possible that different starting points apply to different types of damage, depending on the point of time when each of the claims was presented (and was detailed enough). In practice, a party must pay attention to claiming interest for late payment from the earliest possible point in time. Moreover, interest for late payment is relevant, for example, if the defendant does not pay compensation in time after a judgment awarding damages.

- (FI.5) The conditions under which profit interest is payable have been briefly described in the answer above. As an addition, it may be noted that on the basis of some Supreme Court judgments it seems that perceptions of the legitimacy of having a certain amount of money in one's possession or the justifiability of the original money transfer may at least sometimes have a role in the evaluation. As regards the first mentioned, the Supreme Court has reasoned that because a bankruptcy estate should have understood that a money sum paid to it was paid in error (without knowledge of the bankruptcy procedure), it had to pay profit interest when returning the sum.<sup>336</sup> Justifiability of the original money transfer was a part of the reasoning resulting in an obligation to pay profit interest in a situation where a buyer had paid the price in an unclear situation, where it was not known whether his purchase at an interrupted auction would be valid.<sup>337</sup> In legal literature, however, it has been suggested that these factors would not form conditions for the obligation to pay profit interest as their appearance in case law is not coherent.<sup>338</sup>
- (FI.6) Whether the claim is brought in tort, breach of contract or restitution/unjust enrichment should not, in principle, be highly relevant when it comes to actual interest or interest for late payment. Nevertheless, the conditions under which the relevant type of interest is payable must, of course, be met in terms of the facts of the case.<sup>339</sup> The obligation to pay profit interest is blurry and the case law still developing. The applicability of profit interest and differences in application when it comes to tortious or contractual damages claims, return of contract price, and extra-contractual restitution/unjust enrichment situations have been discussed in the legal literature<sup>340</sup> but the state of law is somewhat unclear. The case law of the Supreme Court is pointillist and does not discuss the obligation to pay profit in a clear and generally applicable way.<sup>341</sup> In the case of reduction of contract price and related return of money, the obligation to

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<sup>336</sup> KKO 1992:150.

<sup>337</sup> KKO 1993:76.

<sup>338</sup> See A. Saarnilehto, Tuottokorko ('Profit Interest') in the volume *Varallisuusoikeus* ('Law of Property') electronic version, <http://fokus.talentum.fi/teos/IAIBCXTBF>, 2012.

<sup>339</sup> One may assume that the different claim types are used in partially different factual conditions. See also Parts IV and V below: some of the claim types may – in practice when it comes to the reasoning of, for instance, lower instance courts – be 'more open' for EU law uniform interpretation than others. In particular, damages claims under specific competition law provisions may be contexts where the national courts readily take the full effectiveness of EU law into account.

<sup>340</sup> See, for example, Saarnilehto in the volume *Varallisuusoikeus* 2012; A. Saarnilehto – T. Sonck, *Perusteettoman edun palautus* ('Restitution in Unjust Enrichment Situations') in the volume *Varallisuusoikeus* electronic version 2012.

<sup>341</sup> See, for instance, KKO 2002:44; KKO 1996:19; KKO 1992:150. Extra-contractual restitution (which should be distinguished from returning the contract price in a contractual relationship) / unjust enrichment are also based on a general legal principle and the position and nature of the related remedies is not always clear. The scope as regards the money/assets that must be returned is particularly highlighted in the legal literature (for being unclear). See Saarnilehto – Sonck 2012.



pay profit interest has often arisen in case law.<sup>342</sup> For these cases, the legal literature affirms the obligation to pay profit interest (if profit interest is claimed).<sup>343</sup> In the context of a damages claim, profit interest is considered applicable if by breaching a contract (as interpreted very broadly) one party made the other perform or pay something that it was not (objectively) obliged to perform.<sup>344</sup> Profit interest is apparently not considered applicable in other damages claims situations.<sup>345</sup>

### 1.3. Is payment of interest compulsory or at the discretion of the court?

- (FI.7) The courts are not under an obligation to order payment of interest *ex officio*, that is, payment of interest must always be claimed. Interest matters are also to a great extent of such a nature that parties may agree on them (either before or during a court dispute). A general civil procedure provision (and also principle) sets out that as a main rule, in civil procedure disputes, the court is bound by the claims of the parties.<sup>346</sup> The provision is completed by a statement noting that '(i)n a case amenable to settlement, the judgment may not be based on a circumstance not referred to by a party in support of his or her claim or denial'.<sup>347</sup> There are interest issues that are, under the Finnish law, relatively unclear or depending on the interpretation of the law or a contract etc. As to such matters, a court has discretion (but is still bound by the claims). Nevertheless, there are presumptions regarding the obligation to pay interest that are relevant when it comes to the issue of how the claims of the parties must be supported and thus also affect the discretion of the court. See also 1.5.

### 1.4. What is said to be the purpose of the interest payment?

- (FI.8) As to *actual interest*, the preparatory works of the Interest Act do not explicitly discuss its purpose.<sup>348</sup> Regarding *interest for late payment*, its purpose is both preventive and reparative.<sup>349</sup> In the Supreme Court case law the purpose of *profit interest* payment or the purpose of returning profit is apparently considered to be to compensate for the loss of (investment) profit but partially, or in some cases, also to eliminate any benefit the party liable to pay profit interest may have obtained.<sup>350</sup>

<sup>342</sup> See Supreme Court Decisions KKO 1992:86; KKO 1993:38; KKO 1998:51.

<sup>343</sup> See A. Saarnilehto, Tuotto- ja viivästyskorosta ('About Profit Interest and Interest for Late Payment') in Oikeustieto ('Law Info') 5/2013, 17–18.

<sup>344</sup> A. Saarnilehto, Tuottokorko ja vanhentunut palautusvelvollisuus ('Profit Interest and a Prescribed Obligation to Return'), Oikeustieto 1/2005, 21–22, and by the same author, Tuottokorkoa vahingonkorvaukselle? ('Profit Interest for Damages Compensation?'), Oikeustieto 5/2005, 9–11. On the basis of notes made by the author, a breach of contract may also be a 'constructive breach of contract' where the 'breach' leads the other party to pay something based on an unenforceable obligation, (such as a competition-restriction based part of the price, overcharge).

<sup>345</sup> The effects of the asserted legal bases or the nature of the claims when it comes to the obligation to pay profit interest in a cartel situation are unclear under the Finnish law. See also the descriptions of the Helsinki District Court asphalt cartel judgments in Part IV. In the asphalt cartel judgments the Court awarded compensation similar to the effects of profit interest in case of damages compensation outside contractual relationship. That is, profit interest for contract partners, *equivalent compensation which was not construed as interest* to others than contract partners.

<sup>346</sup> See Code of Judicial Procedure (4/1734, in Finnish *Oikeudenkäymiskaari*, 'Code of Judicial Procedure'), Chapter 24 Section 3(1): 'The court shall not pass judgment for more than what was claimed by a party, nor on something other than what was claimed by a party.'

<sup>347</sup> Code of Judicial Procedure, Chapter 24 Section 3(2).

<sup>348</sup> See the preparatory works HE 109/1981 vp.

<sup>349</sup> See the preparatory works HE 109/1981 vp, for instance, 3. See also Wilhelmsson – Sevón 1984, 1–2.

<sup>350</sup> See, for instance, Supreme Court judgments KKO 1990:116; KKO 1993:124; KKO 2002:44. In the legal literature, it has been noted that in situations where an object (a good) is returned, the focus seems to be on *returning the benefits*

### 1.5. What is the legal basis for the payment of interest (statutes, contractual agreements, case law, soft law guidance)?

- (FI.9) The legal basis for the payment of interest is, firstly, a statute (the Interest Act) when it comes to *actual interest* and *interest for late payment*. The Interest Act is, however, to a great extent dispositive (not mandatory) which means that a contract may set the provisions of the Interest Act aside. According to the Interest Act Section 2(1), the obligation to pay interest is determined under the Act, unless something else follows from the obligation of the debtor or a business practice or unless otherwise provided by law. As a main rule, contracts for interest deviating from the provisions of the Interest Act are acceptable and enforceable.<sup>351</sup> Under the Interest Act, two presumptions apply: *interest is not payable* for a debt before the debt is due (unless otherwise contractually agreed upon)<sup>352</sup> and *after a debt is due, the obligation to pay interest for late payment arises* (both the obligation to pay interest for late payment in general and the point of time when interest starts to accrue in accordance with the Interest Act if not otherwise contractually agreed upon)<sup>353</sup>.
- (FI.10) As to *profit interest*, (the generally applicable) obligation to pay this is based on a general legal principle.<sup>354</sup> An important reason for why profit interest is not awarded more often is that many claimants do not request it and courts are obliged not to go beyond the pleadings of the parties (*ne ultra petita*).<sup>355</sup> In the recent ‘Asphalt Cartel Damages Claims’ case, profit interest was claimed and awarded (for details, see Part IV). Agreements on profit interest, excluding it or confirming the obligation to pay it and its rate, are seen as possible and enforceable.<sup>356</sup>

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obtained but that in situations where money is returned the purpose is more clearly, at least often, merely to *compensate the loss of investment profit*. See Saarnilehto in the volume Varallisuusoikeus 2012. Note also, however, the answer on the rate of profit interest (2.1). There are controversies between comments on the purpose of interest payment and on the rate of profit interest. It would be logical that the purpose and the relevant rate (claimant’s, defendant’s, a general rate) would have a strong connection, but the pointillist and partially contradictory case law does not clearly support this.

<sup>351</sup> The main rule could be seen as suggesting that even cartel members may modify the obligation to pay interest by terms of customer contracts. However, the cartel context could be an exception to the main rule that contract terms on interest are enforceable. No precedent or other clear authoritative source seems to exist.

<sup>352</sup> See the Interest Act, Section 3(1).

<sup>353</sup> See the Interest Act, Section 4(1).

<sup>354</sup> See the references to case law and special legislation under question 1.

<sup>355</sup> See Code of Judicial Procedure, Chapter 24 Section 3. See also Norros 2012, 171–175; Saarnilehto 2013, 17–18. From the point of view of EU requirement for full compensation, it should be noted that not awarding interest or certain interest type when it is not even claimed could be in conformity with the requirement (in contrast with the situation where, for instance, profit interest is claimed and not awarded). To this author’s knowledge, EU law on the requirement for full compensation and on the responsibility of the parties to make necessary claims and assert the necessary legal bases is very scarce or inexistent.

<sup>356</sup> See Saarnilehto in the volume Varallisuusoikeus 2012. Here, again, the Finnish case law is not very developed. Cartel context could be seen as an exception to the main rule, but no authoritative source stating this clearly seems to exist.

- a. What are the procedures for the party seeking to receive interest on the damages paid? (For example, does the claimant have to make a separate plea for the interest payments and if so, what information and evidence must be supplied?)

(FI.11) Payment of interest must be claimed by the claimant. If, for instance, both *interest for late payment* and *profit interest* are wanted they both must be claimed.<sup>357</sup> Chapter 24 Section 3(1) of the Finnish Code of Judicial Procedure states, as noted above, that in a civil procedure dispute, the court may not pass a judgment on something more than was claimed by a party, nor on something other than was claimed by a party. In practice, claims for interest are often connected to claims for, for example, damages. For instance: ‘The claimant claims 100 000 euros plus interest as compensation for damage caused by Z’<sup>358</sup>. The claimant asks the Court to confirm that profit interest of Y% for the compensation sum should be paid for the period T1–T2.<sup>359</sup> The claimant asks the Court to confirm that interest for late payment, as defined in the Interest Act, Section 4(1), is payable starting from [the date on which the first detailed claim for damages was made, T2].’<sup>360</sup> The assumptions relating to *actual interest* and *interest for late payment* discussed in the answer above (1.5) affect the burden of proof and the type of proof needed. Note that the presumption regarding actual interest is that before a due date, no interest is payable. Thus, claim on actual interest must be supported, for example, by contract terms which set the presumption aside. The claim for the ‘alternative’, profit interest, must be supported by showing that the preconditions for profit interest are fulfilled (and here, no presumption against profit interest applies). Evidence and evidentiary matters as regards interest in particular are not discussed in the Interest Act or, to this author’s knowledge, in the case law.<sup>361</sup>

## Part II Calculation of interest

### 2.1. What is the rate of interest that is set? How is it arrived at? Are there statutes?

(FI.12) The rate for *actual interest* is, according to Section 3(2) of the Interest Act, determined by the applicable reference rate (*viitekorko* in Finnish) if no contract as regards the applicable rate has been formed. According to the current version of Section 12 (in force since 2002), the reference rate is the interest rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of each half-year rounded up to the nearest half-percentage point. The *interest for late payment* rate is, according to Section 4(1) of the Interest Act, seven percentage points higher than the reference rate.<sup>362</sup> There is a

<sup>357</sup> See, for instance, the Turku Appellate Court judgment 11.4.2012, S 11/1656 (final) where only interest for late payment was claimed and awarded. The case dealt with damages and price reduction in the context of a piecework contract. Also actual interest must be claimed if awarding actual interest is wished for. Because of the presumptions regarding interest (1.5 above), for instance contract terms on the obligation to pay the debt must be presented to support the actual interest claim. Note that, by definition, actual interest and interest for late payment concern different periods of time but profit interest and actual interest (mainly) the same period of time (Part I, in particular 1.1 above).

<sup>358</sup> As regards the obligation to pay profit interest in the context of a damages claim, see also the answer to question 1.2 and comments on the Helsinki District Court asphalt cartel judgments in Part IV.

<sup>359</sup> The period being, for instance, the one between paying the original sum (T1) and the start of accrual of interest for late payment (T2). This is clarified further in 2.3.

<sup>360</sup> For a more nuanced real example, see, for instance, the claims by the city of Espoo in the asphalt cartel case, L 09/49467, 28.11.2013 Helsinki District Court.

<sup>361</sup> See, however, also the answer to question 7 as regards the rate of *profit interest*.

<sup>362</sup> In the table below, the interest rate meant in Sections 3(2) and 12 of the Interest Act is indicated in the first rate column (‘Interest rate’). The interest for late payment rate is indicated in the second rate column.

major exception to this rule. If the interest for late payment rate would, when determined in accordance with the provision quoted above, be 'lower than the interest paid for the debt prior to the due date, interest for late payment must be paid in accordance with the same grounds as prior to the due date' (Section 4(2)). The applicability of the exception is limited in the case of certain consumer contracts. Section 4a of the Interest Act was added during implementation of Directive 2011/7/EU (amendment in force since 16.3.2013) and for certain commercial contracts in accordance with the Directive<sup>363</sup> it sets an interest for late payment rate which is eight percentage points higher than the reference rate referred to in Section 12.

- (FI.13) Under Finnish law, it is still not completely clear what the rate of *profit interest* is when the obligation to pay profit interest is applied as a general principle. In practice, the rate of profit interest has been mainly the same rate as the rate meant in Sections 3(2) and 12 of the Interest Act.<sup>364</sup> It is also possible that the applicable rate of profit interest is affected, in particular, by the actual possibilities of the defendant to benefit from possession of the sum of money the interest is paid for.<sup>365</sup> In the legal literature, views vary on the general applicability or significance of Supreme Court cases where the actual benefit has played a role.<sup>366</sup> An interpretation is that the rate is the rate indicated by Sections 3(2) and 12 of the Interest Act unless the claiming party shows that the defendant received a greater profit from the money sum or the defendant shows that he received a lower profit.<sup>367</sup>

## 2.2. Is interest simple or compound? If the interest is neither simple nor compound as defined above, please elaborate.

- (FI.14) Interest is not normally compound unless *another type of interest* is accruing on a debt, which is formed by a different type of interest which has already accrued (in this case the effect is 'partially compound').<sup>368</sup> *Actual interest* or *interest for late payment* do not accrue as compound interest (unless contractually agreed upon and specific restrictions on the freedom of contract do not prevent enforcing the contract).<sup>369</sup> Interest for late payment may, in any

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<sup>363</sup> Amendment 32/2013.

<sup>364</sup> See Supreme Court judgments KKO 1996:19; KKO 1997:1; KKO 2005:69. See also KKO 1992:150, and the preparatory works of an amendment, discussing the Interest Act Section 3(2): HE 232/2001 vp, for instance, 12. The preparatory works suggest that using the rate as the rate of profit interest is possible. This is also the (presumed) rate many particular provisions indicate as the profit interest rate.

<sup>365</sup> See, in particular, Supreme Court case KKO 2002:44. See also KKO 1990:116.

<sup>366</sup> See Saarnilehto in the volume Varallisuusoikeus 2012; Norros 2012, 175–177. See also the answer on the purpose of profit interest payment: there are controversies between comments on the purpose of profit interest payment and on the factors which affect the applicable rate.

<sup>367</sup> The profit defendant received may truly affect the rate if this *point of view is chosen* (relevance and general applicability is currently unclear, also the claimant's circumstances could be relevant). The case law on factors affecting the rate of profit interest is scarce. In the Supreme Court judgment KKO 2002:44, the Court found it relevant that the parties who had had the principal sum in their possession (private persons) had not received profit. See also Saarnilehto in the volume Varallisuusoikeus 2012.

<sup>368</sup> For instance, there is *a debt which consists of actual interest which has already accrued* on a debt in accordance with a loan contract (100 euros of accrued actual interest, the principal sum and related debt most likely still exist too, but it is not of relevance here). The debt which is formed by the accrued actual interest (100) is due. The payment of this debt is delayed resulting in a situation where interest for late payment accrues for the debt of 100 euros (the entire interest debt then becoming 100 euros + interest for late payment for 100 euros). See also the hypothetical below.

<sup>369</sup> See, as to interest for late payment in particular, the preparatory works for the Interest Act HE 109/1981 vp, 19; Supreme Court judgment KKO 1992:118.

case, *accrue on a debt which is formed by previously accrued, unpaid actual interest*.<sup>370</sup> Nevertheless, the actual interest itself remains as simple interest and interest for late payment remains as simple interest. As regards *profit interest*, this does not, in itself, accrue as compound interest. However, the exclusion in Section 1(2)(4) of the Interest Act does not concern a debt the contents of which is previously accrued unpaid profit interest. Profit interest debt may thus be treated as an actual interest debt which means that interest for late payment accrues on the debt sum.<sup>371</sup> Thus, interest for late payment is simple, actual interest is simple and profit interest is simple, when an interest type is studied separately. Nevertheless, when a debt is formed by another type of interest which is due, interest for late payment accrues on this earlier interest debt. Hence, the interest is to an extent compound when two categories are studied together, but within each interest category interest is simple.<sup>372</sup>

**2.3. What is the time for which interest is calculated? When does interest start to accrue, when does the accrual of interest end? Are there any situations where the action of the plaintiff, for example delay on his part, serves to change the time for which interest is calculated? Are there provisions for suspension of the accrual of interest?**

- (FI.15) As to *actual interest*, which accrues before the due date of a debt, the specific time of accrual and its details are, as a main rule, defined by a contract between the parties.<sup>373</sup> As to *interest for late payment*, the starting point of accrual was already commented on in the answers to questions 1.1–1.2 above. The point of time meant in the provision on presenting a damages claim is not necessarily a moment when complete information on the damage is presented.<sup>374</sup> It is possible that accruing starts, for instance, due to a claim before a court dispute.<sup>375</sup> In the unlikely but possible case that a due date has been agreed for a damages compensation debt, interest for late payment must be paid from the due date onwards.<sup>376</sup> There is a special rule regarding the point of time when interest for late payment starts to accrue when it comes to ‘intentional offences’.<sup>377</sup> The provision refers to criminal offenses.<sup>378</sup> Restricting competition is not a crime in Finland<sup>379</sup> and, apparently, this provision is not interpreted broadly in such a

<sup>370</sup> From the point of view of interest for late payment a debt which is formed by accrued interest of another type is like any other debt, this is why interest for late payment may accrue for a debt consisting of another type of interest which is due. See Supreme Court judgment KKO 1984 II 98.

<sup>371</sup> See Supreme Court judgments KKO 1997:155 and KKO 1993:124. See also Saarnilehto in the volume Varallisuusoikeus 2012: according to the author this should apply regardless of the legal basis of profit interest payment. In order to illustrate, there is a *debt which consists of profit interest which has already accrued* (100 euros of accrued profit interest, the principal sum and related debt most likely still exist too, but it is not of relevance here). The debt which is formed by the accrued profit interest (100) is due. The payment of this debt is delayed resulting in a situation where interest for late payment accrues for the interest debt of 100 euros (the entire interest debt then becoming 100 euros + interest for late payment for 100 euros). See also the hypothetical below.

<sup>372</sup> See also the hypothetical below.

<sup>373</sup> See also answers to questions 1.2 and 1.5 above.

<sup>374</sup> See the preparatory works HE 109/1981 vp, 6–7.

<sup>375</sup> See also the preparatory works HE 109/1981 vp, 6–7.

<sup>376</sup> See the Interest Act, Section 5.

<sup>377</sup> See the Interest Act, Section 8, according to which interest for late payment for compensation of damage caused by an intentional offence must be paid from the date the damage occurred.

<sup>378</sup> Which is more evident from the Finnish version of the provision. The Finnish wording is ‘*tahallisella rikoksella*’ which could also be translated as ‘intentional criminal offence’. It is possible to try to use analogical support from this provision and claim that a cartel is ‘a near-crime’ which supports accrual since an early point of time.

<sup>379</sup> Criminalizing cartels is, in any case, discussed at intervals. Kilpailulaki 2010 (‘Competition Act 2010’, Ministry of Employment and the Economy, <https://www.tem.fi/files/21617/TEM4.pdf>), 50–51; Study (on criminalizing cartels) prepared by the Faculty of Law, University of Helsinki at the request of the Finnish Competition and Consumer

way that it could encompass competition restrictions.<sup>380</sup> As to *profit interest*, the time for accrual is the time between receiving the principal sum and returning it.<sup>381</sup> If interest for late payment starts to accrue on the principal sum, accrual of profit interest for the same principal sum ceases.<sup>382</sup> As indicated above, interest for late payment may accrue, for instance, for accrued profit interest. For instance, if accrued and due profit interest is 100 euros, interest for late payment accrues for this sum in addition to the principal sum.

- (FI.16) As to situations where the time for which interest is calculated changes or where suspension of accrual is possible, Interest Act Section 10 is of relevance: If it has been impossible to pay the debt on time due to a reason attributable to the creditor, the debtor is liable to pay interest after the due date only from the date when he became aware of the cessation of the hindrance. Moreover, if the payment is delayed due to *force majeure*, the debtor is exempted from paying the interest corresponding to the duration of the delay caused by the hindrance. Furthermore, Section 11 on adjustment of the interest for late payment includes, as one of the potential reasons for adjustment, the fact that the debtor is found to have had a justified reason to refuse to pay the debt.<sup>383</sup>

**2.4. Are there any specific provisions if payment is requested in a different currency than that in the state where the lawsuit is brought? (e.g. a Swedish company claims for damages resulting from an EU-wide cartel against a German cartel member in Germany. Can the court award only EUR or also Swedish Krona?)**

- (FI.17) There are no specific provisions regarding the theme of currencies and interest. As indicated above, a general civil procedure provision (and also principle) sets out that in civil procedure disputes the court is bound by the claims of the parties.<sup>384</sup> This is seen as suggesting that awards in different currencies are possible (and correct solutions) at least when the obligation to pay in a certain currency is not separately disputed after a claim to pay in the specific currency has been made.<sup>385</sup> One may also state that the court may not order payment in a currency in which *none* of the parties claimed the payment should be made. However, according to a provision of the Promissory Notes Act (622/1947, *Velkakirjalaki*), which is also seen as a source of general civil law principles, the official local currency (in Finland now: euro) must always be accepted as a means of payment when payment is actually completed if the/a correct *place* of payment is Finland. This applies apparently regardless of, for instance, a court judgment ordering payment in Swedish Krona.<sup>386</sup> Thus, to avoid payment in euro with certainty, an interested party must prove and secure that Finland cannot be seen as a/the correct place for completing payment.

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Authority (30.4.2014): <http://www.kkv.fi/globalassets/kkv-suomi/ajankohtaista/tiedotteet/2014/hy-selvitys-27-5-2014.pdf>.

<sup>380</sup> See also the description of the (Helsinki District Court) asphalt cartel judgments in Part IV.

<sup>381</sup> See the Supreme Court judgments KKO 1996:19; KKO 1998:51; KKO 1992:150.

<sup>382</sup> See, for instance, Supreme Court judgment KKO 2005:69. See also, for instance, the asphalt cartel judgments by the Helsinki District Court concerning claims by the City of Helsinki and Espoo.

<sup>383</sup> Similar detailed rules on *profit interest* when the obligation to pay profit interest is based on the general principle are not available. Analogical support from rules like those now under discussion may be possible.

<sup>384</sup> Code of Judicial Procedure, Chapter 24 Section 3(1): 'The court shall not pass judgment for more than was claimed by a party, nor for something other than was claimed by a party.'

<sup>385</sup> See also KKO 2005:69.

<sup>386</sup> See the Promissory Notes Act Section 7(1).

- 2.5. As damage claims for infringements of EU competition rules often pertain to long-running infringements, please include all applicable interest rates and the date the rate came into force from 1 January 1985 until today. Unless impossible due to national peculiarities, the rates should be listed in a two column table, containing the rate and the date it came into force. This should be accompanied by a legal retrospective that sets out any other changes to the relevant interest regime (e.g. the time interest starts to run etc.) which occurred over this period, in order to allow a determination of which rules applied at a given point in time between 1 January 1985 and today.

The table of interest rates<sup>387</sup>:

Date	Interest rate	Interest for late payment (viivästyskorko), rate	Changes and notes
First rate column: Base interest rate ( <i>peruskorko</i> ) as confirmed by the Bank of Finland			
1.7.1983	9.50	16.00	Interest Act (633/1982)
1.2.1985	9.00	16.00	
1.1.1986	8.50	16.00	
1.3.1986	8.00	16.00	
19.5.1986	7.00	16.00	
16.5.1988	8.00	16.00	
1.1.1989	7.50	16.00	
1.11.1989	8.50	16.00	
1.5.1992	9.50	16.00	
1.1.1993	8.50	16.00	
15.2.1993	7.50	16.00	
17.5.1993	7.00	16.00	
15.7.1993	6.50	16.00	
16.8.1993	6.00	16.00	
1.12.1993	5.50	16.00	
1.2.1994	5.25	16.00	
Reference rate ( <i>viitekorko</i> ) replaced the base interest rate ( <i>peruskorko</i> ) at this point			
1.5.1995	6.00	13.00	Interest Act, amendment (284/1995)
1.1.1997	4.00	11.00	
1.1.1998	3.00	10.00	Interest Act, amendment (997/1998)
1.1.1999	4.00	11.00	
1.1.2000	3.00	10.00	
1.1.2001	4.00	11.00	
1.7.2002	3.50	10.50	Interest Act, amendment (340/2002)
1.1.2003	3.00	10.00	
1.7.2003	2.50	9.50	

<sup>387</sup> Only changes in the rates have been documented here, that is, when the same rate has been confirmed, it has not been listed separately. Sources of the figures in the table: statistics and documents by the Bank of Finland [http://www.suomenpankki.fi/fi/tilastot/korot/pages/tilastot\\_markkina-\\_ja\\_hallinnolliset\\_korot\\_viitekorko\\_fi.aspx](http://www.suomenpankki.fi/fi/tilastot/korot/pages/tilastot_markkina-_ja_hallinnolliset_korot_viitekorko_fi.aspx); [http://www.suomenpankki.fi/fi/tilastot/korot/Pages/tilastot\\_markkina-\\_ja\\_hallinnolliset\\_korot\\_peruskoron\\_muutokset\\_fi.aspx](http://www.suomenpankki.fi/fi/tilastot/korot/Pages/tilastot_markkina-_ja_hallinnolliset_korot_peruskoron_muutokset_fi.aspx). As regards the latest rates at the time of writing, see a press release at [http://www.suomenpankki.fi/en/suomen\\_pankki/ajankohtaista/tiedotteet/pages/tiedote29\\_2014.aspx](http://www.suomenpankki.fi/en/suomen_pankki/ajankohtaista/tiedotteet/pages/tiedote29_2014.aspx). At the time of writing, the latest confirmation of rates have been made regarding the six-month period starting from 1.1.2015, and the last rates in the table here are (again) the ones that have been confirmed as applicable. See links to the English versions of publications by the Bank of Finland below in the main text. Interest for late payment (*viivästyskorko*) is translated by the Bank of Finland as 'penalty interest (on overdue payment)'.

1.7.2006	3.00	10.00	Note: an alternative interest rate applies for late payments (commercial contracts, see Directive 2011/7/EU; Interest Act, amendment 30/2013). At the time of writing the alternative interest for late payment rate has been 8.50 (since entry into force).
1.1.2007	4.00	11.00	
1.7.2007	4.50	11.50	
1.1.2009	2.50	9.50	
1.7.2009	1.00	8.00	
1.7.2011	1.50	8.50	
1.1.2012	1.00	8.00	
1.7.2013	0.50	7.50	

(FI.18) The current Interest Act Sections 3(2) and 12 refer to reference interest (*viitekorko*). Before 1995, the relevant interest was not reference interest but base interest (*peruskorko*) as indicated in the table.<sup>388</sup> The table includes rates which are relevant from the perspective of the Interest Act. Profit interest, excluded from the scope of the Interest Act, is not absolutely and exhaustively determined by these rates (or any regularly published rates).<sup>389</sup>

<sup>388</sup> Regarding changes to the interest regime, the following should be noted (the changes taken into account are relevant amendments to provisions directly dealing with factors affecting the amount of interest). **Legislative changes relating to the applicable (basic) interest rate:** Amendment 284/1995 entered into force on 1.5.1995. The amendment was a change in the relevant interest rate so that the annual average of a 3-month market rate confirmed by the Bank of Finland became the decisive rate. The amendment was in force until 1.1.1999. Amendment 997/1998 entered into force on 1.1.1999. The obligation to confirm the interest rate was transferred to the Ministry of Finance. The amendment was in force until 1.7.2002. Amendment 340/2002 entered into force on 1.7.2002. The provision on the interest rate was changed by adding a reference to the Section 12 (on the applicable reference rate). The applicable reference rate was changed so that it is determined by the interest rate applied by the 'European Central Bank to its most recent main refinancing operation carried out before the first calendar day of each half-year rounded up to the nearest half-percentage point'. The reference rate in force on the first calendar day of the half-year in question applies for the following six months. These latest changes are still in force. **Legislative changes relating to the interest for late payment:** The original provision according to which interest for late payment was 16% (under the main rule) was in force until 1.5.1995. Amendment 284/1995 entered into force on 1.5.1995. According to the new main rule, in the case of an agreement on the interest rate, the interest for late payment was the agreed (basic) rate + 4%, but, nevertheless, at most the interest rate confirmed by the Bank of Finland +10%. In the case of no agreement on the (basic) interest rate, the interest for late payment was the interest rate confirmed by the Bank of Finland + 7%. These rules were in force until 1.1.1999. Amendment 997/1998 entered into force on 1.1.1999. The change was that the actor confirming the (basic) interest was the Ministry of Finance. The amendment was in force until 1.7.2002. Amendment 340/2002 entered into force on 1.7.2002. The interest for late payment was changed to be (under the main rule) the reference rate (Section 12) +7 %. Under the original Act, interest for late payment for a damages compensation debt (Section 7) started to accrue when *a month* had passed from the detailed claim for damages. Amendment 340/2002 changed the wording: '*30 days*'. These changes are in force. Amendment 846/2009 relating to the Section 4(2) (on the rate of interest for late payment in exceptional cases) entered into force on 1.2.2010. The amendment in the Interest Act was, however, a formal one, regarding the way in which certain other consumer contract rules were referred to. See the preparatory works HE 64/2009 vp. As regards changes relating to implementation of Directive 2011/7/EU, see the answer on interest rates (7) above.

<sup>389</sup> See 2.1 above. The often relevant rate meant in Sections 3(2) and 12 of the Interest Act is indicated in the table in the first rate column ('Interest rate').



**2.6. Please identify an official, reliable, publicly available source that publishes the pertinent legal interest rates as they change.**

(FI.19) The Bank of Finland (*Suomen Pankki*) (<http://www.suomenpankki.fi/en/Pages/default.aspx>) publishes notifications regarding changes.<sup>390</sup> Legislative changes are published in the Statutes of Finland (*Suomen säädöskokoelma* in Finnish), available in electronic form at <http://www.finlex.fi/fi/laki/kokoelma/>.

**2.7. If interest rates change on a fixed schedule, please indicate the schedule.**

The rates are changed or *confirmed without changing* at six month intervals.<sup>391</sup>

**2.8. If part of the debt / the damage is being paid, how is interest calculated following that payment? In particular: Do partial payments first cover interest or the principal amount? Is there any provision or legal practice similar to Art 86(3)(2) of the rules of application of Regulation 966/2012 on the financial rules applicable to the general budget of the Union where it is stated that ‘Any partial payments shall first cover the interest’?**

(FI.20) The main rule is that partial payments first cover interest.<sup>392</sup> The way of calculation is not changed by a partial payment.

**2.9. Hypothetical: Please calculate interest in the following hypothetical case. All dates are given in the format dd.mm.yyyy. All amounts are stated without specifying the currency to abstract from implications of the introduction of the common Euro currency. Assume that the claims have not been time barred. Assume that a national court in the Member State on which you are reporting has jurisdiction to rule on the case. Assume that the cartelists are jointly liable for the damage caused by the cartel. If results differ materially depending on whether accrual of interest is based purely on national law or made in compliance with the EU principle of full compensation, provide both calculations.**

There was a long running pan-European cartel for a product that materially affected trade between Member States. The cartel lasted from the beginning of 1993 until the dawn raids (unannounced inspections) of the European Commission on 02.02.2009.

On 30.11.2010, a longtime customer of the cartel, who bought the cartelised product in the Member State on which you are reporting, brings a claim for damages against three cartelists (A, B, and C). All of the three defendants have their seat in the Member State on which you are reporting. The customer only bought the cartelised product of the cartelists A and B. In the writ, the claimant specifies the damages caused by the cartel and the date on which the respective damage occurred. The claimant also specifically requests that interest be paid on the damages. The damages (always = 100) and

<sup>390</sup> See [http://www.suomenpankki.fi/fi/suomen\\_pankki/ajankohtaista/tiedotteet/Pages/default.aspx](http://www.suomenpankki.fi/fi/suomen_pankki/ajankohtaista/tiedotteet/Pages/default.aspx), or in English [http://www.suomenpankki.fi/en/suomen\\_pankki/ajankohtaista/tiedotteet/Pages/default.aspx](http://www.suomenpankki.fi/en/suomen_pankki/ajankohtaista/tiedotteet/Pages/default.aspx), and, for instance, [http://www.suomenpankki.fi/fi/suomen\\_pankki/ajankohtaista/tiedotteet/Pages/tiedote17\\_2014.aspx](http://www.suomenpankki.fi/fi/suomen_pankki/ajankohtaista/tiedotteet/Pages/tiedote17_2014.aspx), or in English [http://www.suomenpankki.fi/en/suomen\\_pankki/ajankohtaista/tiedotteet/Pages/tiedote17\\_2014.aspx](http://www.suomenpankki.fi/en/suomen_pankki/ajankohtaista/tiedotteet/Pages/tiedote17_2014.aspx). See also interest rate table by the Bank of Finland: [http://www.suomenpankki.fi/fi/tilastot/korot/pages/tilastot\\_markkina-\\_ja\\_hallinnolliset\\_korot\\_viitekorko\\_fi.aspx](http://www.suomenpankki.fi/fi/tilastot/korot/pages/tilastot_markkina-_ja_hallinnolliset_korot_viitekorko_fi.aspx), or in English [http://www.suomenpankki.fi/en/tilastot/korot/Pages/tilastot\\_markkina-\\_ja\\_hallinnolliset\\_korot\\_viitekorko\\_en.aspx](http://www.suomenpankki.fi/en/tilastot/korot/Pages/tilastot_markkina-_ja_hallinnolliset_korot_viitekorko_en.aspx). The table is updated in the case of changes.

<sup>391</sup> See the Interest Act, Sections 12–12a.

<sup>392</sup> A general principle based on an expression in the Code on Sale of Goods (1734/3, *Kauppakaari*) Chapter 9 Section 5.

respective dates are set out in table 1 below. Should a subjective rate be of relevance, you will find the ROI (Return On Investment) rates of the claimant and the three defendants in table 2. You will also find the average interest rate that the claimant had to pay on credit taken out in that year (claimant's average refinance rate).

On 26.11.2013 a court renders a final judgment, ordering the defendant(s) to pay damages and interest. The defendants take until 12.02.2014 to pay. Please specify the total amount the jointly liable defendants have to pay on 12.02.2014 in order to relinquish their debt towards the claimant.

Table 1

Date the damage occurred	Damage amount
15.11.1993	100
17.09.1996	100
22.02.2006	100
12.08.2008	100

Table 2

Year	Claimant's refinance rate in %	Claimant's annual ROI in %	Defendant's A annual ROI in %	Defendant's B annual ROI in %	Defendant's C annual ROI in %
1993	6	5,5	4	4	3
1994	6	9,8	4	4	4
1995	6	9,5	4	4	5
1996	6	1	0	0	0
1997	8	-3,8	1	1	3
1998	8	1,1	4	4	5
1999	8	2,8	1	1	3
2000	8	1,1	-2	-1	0
2001	8	4,51	2	2	3
2002	8	5,3	4	4	5
2003	8	8,21	9	9	9
2004	7	9	3	3	2
2005	7	10	1	1	1
2006	7	6	1	1	1
2007	5	-5	4	4	2
2008	5	-7	-1	0	0
2009	5	-5	2	2	4
2010	5	-3	4	4	4
2011	5	-2,7	4	4	2
2012	5	1,61	-2	-1	0
2013	5	4,4	8	8	7
2014	5	1,41	-4	-3	-1

- (FI.21) It is assumed that no part of the damages claim has become prescribed. It is assumed that profit interest or a similar compensation<sup>393</sup> is applicable. For the sake of simplicity, it is called profit interest. In addition to profit interest, interest for late payment appears to apply (in a case before a Finnish court it could be necessary or at least wise to name these interest categories in addition or instead of a general claim on interest). Here, the claimant's claim (30.11.2010) is considered as fulfilling the requirements set by Interest Act, Section 7 (something that is evaluated *in casu*). Thus, profit interest accrues on each of the principal sums until the date of the claim and interest for late payment accrues on each of the principal sums and on accrued profit interest after the date of the claim. The interest for late payment ceases to accrue when the payment is made (12.02.2014).
- (FI.22) **Profit interest:** since no particular claims and responses regarding the rate of profit interest are described, it is assumed that the presumption rate (or the 'almost presumption' rate) of profit interest applies.<sup>394</sup> Thus the rate indicated by Sections 3(2) and 12 of Interest Act is relevant.

'Damage 1', profit interest

**1993 1.5 months**, 0.5 month 6 %, 1 month 5.5 % ->  
 $0.06 \times 100 \times 0.042 = 0.252$   
 $0.055 \times 100 \times 0.083 = 0.4565 \rightarrow 0.252 + 0.4565 = \mathbf{0.71}$   
**+ 1994 12 months**, 1 month 5.5%, 11 months 5.25% ->  
 $0.055 \times 100 \times 0.083 = 0.4565$   
 $0.0525 \times 100 \times 0.917 = 4.814 \rightarrow 0.4565 + 4.814 = \mathbf{5.27}$   
**+ 1995 12 months**, 4 months 5.25%, 8 months 6% ->  
 $0.0525 \times 100 \times 0.333 = 1.75$   
 $0.06 \times 100 \times 0.667 = 4.002 \rightarrow 1.75 + 4.002 = \mathbf{5.752}$   
**+ 1996 12 months** 6% ->  $0.06 \times 100 = \mathbf{6}$   
**+ 1997 12 months** 4% ->  $0.04 \times 100 = \mathbf{4}$   
**+ 1998 12 months** 3% ->  $0.03 \times 100 = \mathbf{3}$   
**+ 1999 12 months** 4% ->  $0.04 \times 100 = \mathbf{4}$   
**+ 2000 12 months** 3 % ->  $0.03 \times 100 = \mathbf{3}$   
**+ 2001 12 months** 4 % ->  $0.04 \times 100 = \mathbf{4}$   
**+ 2002 12 months**, 6 months 4 %, 6 months 3.5 % ->  $2 + 1.75 = \mathbf{3.75}$   
**+ 2003 12 months**, 6 months 2.5%, 6 months 3% ->  $1.25 + 1.5 = \mathbf{2.75}$   
**+ 2004 12 months** 2.5% ->  $\mathbf{2.5}$   
**+ 2005 12 months** 2.5% ->  $\mathbf{2.5}$   
**+ 2006 12 months**, 6 months 2.5%, 6 months 3% ->  $1.25 + 1.5 = \mathbf{2.75}$   
**+ 2007 12 months** 6 months 4%, 6 months 4.5% ->  $2 + 2.25 = \mathbf{4.25}$   
**+ 2008 12 months** 4.5 % ->  $\mathbf{4.5}$   
**+ 2009 12 months**, 6 months 2.5%, 6 months 1% ->  $1.25 + 0.5 = \mathbf{1.75}$   
**+ 2010 11 months** 1% ->  $0.01 \times 100 \times 0.917 = \mathbf{0.917}$

'Damage 2', profit interest

**1996 3.43 months** 6% ->  $0.06 \times 100 \times 0.286 = \mathbf{1.716}$   
**+ 1997 12 months** 4% ->  $0.04 \times 100 = \mathbf{4}$   
**+ 1998 12 months** 3% ->  $0.03 \times 100 = \mathbf{3}$   
**+ 1999 12 months** 4% ->  $0.04 \times 100 = \mathbf{4}$   
**+ 2000 12 months** 3 % ->  $0.03 \times 100 = \mathbf{3}$   
**+ 2001 12 months** 4 % ->  $0.04 \times 100 = \mathbf{4}$   
**+ 2002 12 months**, 6 months 4 %, 6 months 3.5 % ->  $2 + 1.75 = \mathbf{3.75}$   
**+ 2003 12 months**, 6 months 2.5%, 6 months 3% ->  $1.25 + 1.5 = \mathbf{2.75}$   
**+ 2004 12 months** 2.5% ->  $\mathbf{2.5}$   
**+ 2005 12 months** 2.5% ->  $\mathbf{2.5}$   
**+ 2006 12 months**, 6 months 2.5%, 6 months 3% ->  $1.25 + 1.5 = \mathbf{2.75}$   
**+ 2007 12 months** 6 months 4%, 6 months 4.5% ->  $2 + 2.25 = \mathbf{4.25}$

<sup>393</sup> See also the discussion on the asphalt cartel judgments (IV). The Helsinki District Court applied profit interest to relationships between contract partners and compensation similar to profit interest to other relationships.

<sup>394</sup> See 2.1 and 4.1.

+ **2008 12 months** 4.5 % -> **4.5**  
 + **2009 12 months**, 6 months 2.5%, 6 months 1% ->  $1.25 + 0.5 = 1.75$   
 + **2010 11 months** 1% ->  $0.01 \times 100 \times 0.917 = 0.917$

'Damage 3', profit interest

**2006 10.27 months**, 3.27 months 2.5%, 7 months 3% ->  
 $0.025 \times 100 \times 0.2725 = 0.681$   
 $0.03 \times 100 \times 0.583 = 1.749$  ->  $0.681 + 1.749 = 2.43$   
 + **2007 12 months** 6 months 4%, 6 months 4.5% ->  $2 + 2.25 = 4.25$ .  
 + **2008 12 months** 4.5 % -> **4.5**  
 + **2009 12 months**, 6 months 2.5%, 6 months 1% ->  $1.25 + 0.5 = 1.75$   
 + **2010 11 months** 1% ->  $0.01 \times 100 \times 0.917 = 0.917$

'Damage 4', profit interest

**2008 4.6 months** 4.5 % ->  $4.5 \times 0.3833 = 1.725$   
 + **2009 12 months**, 6 months 2.5%, 6 months 1% ->  $1.25 + 0.5 = 1.75$   
 + **2010 11 months** 1% ->  $0.01 \times 100 \times 0.917 = 0.917$

**Total accrued profit interest**, Damages 1, 2, 3 and 4 together:  
 $0.71 + 5.27 + 5.752 + 6 + 4 + 3 + 4 + 3 + 4 + 3.75 + 2.75 + 2.5 + 2.5 + 2.75 + 4.25 + 4.5 + 1.75 + 0.917 + 1.716 + 4$   
 $+ 3 + 4 + 3 + 4 + 3.75 + 2.75 + 2.5 + 2.5 + 2.75 + 4.25 + 4.5 + 1.75 + 0.917 + 2.43 + 4.25 + 4.5 + 1.75 + 0.917 + 1.725$   
 $+ 1.75 + 0.917 = \underline{\underline{125.021}}$

(FI.23) **Interest for late payment:** accruing starts 1.12.2010, accruing ends on the day of payment.  
 Accrues on the principal sums and on the accrued profit interest.

(Interest for late payment on) Principal sums  
**2010 1 month**,  $8\% \times 400 \times 0.0833 = 2.6656$   
 + **2011 12 months**, 6 months 8% 6 months 8.5%  
 ->  $0.08 \times 400 \times 0.5 = 16 +$   
 ->  $0.085 \times 400 \times 0.5 = 17 = 16 + 17 = 33$   
 + **2012 12 months**,  $8\% \times 400 = 32$   
 + **2013 12 months**, 6 months 8% 6 months 7.5%  $\times 400$   
 ->  $16 + 15 = 31$   
 + **2014 1.4 months** **7.5%**  $\times 400 \times 0.1167 = 3.501$

Total interest for late payment on Principal sums: 102,167

(Interest for late payment on) Accrued profit interest  
**2010 1 month**,  $8\% \times 125.021 \times 0.0833 = 0.833$   
 + **2011 12 months**, 6 months 8% 6 months 8.5%  
 ->  $0.08 \times 125.021 \times 0.5 +$   
 ->  $0.085 \times 125.021 \times 0.5 = 5 + 5.313 = 10.313$   
 + **2012 12 months**,  $8\% \times 125.021 = 10.002$   
 + **2013 12 months**, 6 months 8% 6 months 7.5%  $\times 125.021$   
 ->  $0.08 \times 125.021 \times 0.5 +$   
 ->  $0.075 \times 125.021 \times 0.5 = 5 + 4.688 = 9.688$   
 + **2014 1.4 months**,  $7.5\% \times 125.021 \times 0.1167 = 1.094$

Total interest for late payment on Accrued profit interest: 31, 93

**Interest for late payment in total on the date of payment (12.02.2014): 134.1**

**The total amount to be paid:**

**134.1** (total interest for late payment)  
 + 400 (principal sums)  
 + 125.021 (accrued profit interest)  
 = **659, 121**

### ***Part III. Procedural aspects***

#### **3.1. Does the judge award interest ex officio or does the claimant have to request it?**

(FI.24) See 1.3 above.

#### **3.2. Can the judge award a higher interest amount than requested by the claimant or does the principle of *ne ultra petita* apply?**

(FI.25) The court cannot award a higher amount, the principle *ne ultra petita* applies.

#### **3.2. Can the judge estimate interest or does interest always have to be calculated?**

(FI.26) Interest is calculated (the court expresses the basis for the calculation but as the interest for late payment is normally accruing until the payment is made, the parties make the final calculation themselves). The court has the power to estimate the total damage and the court may have discretion when it comes to factors that affect the interest calculation (for instance, the point of time when interest for late payment starts to accrue.)

#### **3.3. If the claimant changes the request regarding the interest, is this regarded as an amendment of the pleadings? Is this only possible until a certain stage into the proceedings and precluded later on or can the claimant make such changes without negative procedural consequences at any time up to the judgment?**

(FI.27) Changing claims regarding interest may be considered as an amendment. Giving up claims or narrowing them down is generally acceptable at any point of the process. Presenting new claims ('claiming more') may not happen during the proceedings but there are exceptions to this rule, including one on claiming interest based *on an essentially same ground as a previous claim was based*. Even in this case, the claim should be presented before the main hearing if considering the claim would delay the hearing of the entire case (also a later claim may be considered admissible if it would not delay the hearing of the entire case).<sup>395</sup>

### ***Part IV. Specific instances***

#### **4.1. Identify any cases relating to damages claims for infringements of competition law and explain how interest was calculated. In writing these summaries, provide all relevant information about how interest was calculated, so that this information can be passed on to another country reporter who can try and estimate how interest would be calculated in another jurisdiction.**

(FI.28) The following Finnish court cases (all court instances)<sup>396</sup>, include calculation or award of interest: '*Asphalt Cartel Damages Claims*' entity (road construction market), decided by the Helsinki District Court on 28.11.2013. The State of Finland as well as 40 Finnish cities or

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<sup>395</sup> See further the Code of Judicial Procedure Chapter 14 Section 2.

<sup>396</sup> Only decided cases are included. Cases are not included where no calculation of interest took place because damages and other claims were dismissed or because claims were (or are being) settled out of court. The list may be incomplete as lists of pending or decided cases are not published by the lowest court instances. Cases decided in arbitration or mediation are not publicly available.

municipalities<sup>397</sup> presented damages and comparable claims against members of a national asphalt cartel or the members' bankruptcy estates. A final public enforcement decision on the infringement had been made on 29 September 2009, the Finnish Supreme Administrative Court finding that both EU and national competition law had been infringed between 2.5.1994 and 11.2.2002. In the civil procedure, the claimants claimed profit interest and interest for late payment as well as interest for late payment on profit interest in addition to the principal compensation / price returning sums.<sup>398</sup> The Court concluded that the cartel had resulted in a 15–20% overcharge. The Court awarded also interest as explained in detail below.

L 09/49467 Espoon kaupunki ('City of Espoo') > - Lemminkäinen Oyj - Skanska Asfaltti Oy - VLT Trading Oy:n konkurssipesä - NCC Roads Oy - SA -Capital Oy - Rudus Asfaltti Oy - Super Asfaltti Oy	Profit interest was awarded where claimed, at the rate according to the Interest Act Section 3(2).
L 11/11832 Forssan kaupunki ('City of Forssa') > - Lemminkäinen Oyj	Only contract partners were liable for profit interest. The Court reasoned that the obligation to pay profit interest was applicable <i>when a contract party had to compensate or return cartel-based overcharge</i> . The Court considered overcharge as a (constructed) breach of contract but considered the compensation be mainly damages, not returning of contract price. The Court reasoned that in the case of other defendants than contract partners of the claimant, obligation to pay compensation for the loss of investment profit was possible (= <i>compensation</i> the actual effect of which is similar to profit interest, with the same rate as profit interest). <sup>399</sup> Such compensation is awarded only if a claim that signified claiming compensation like this had been made.
L 11/2568 Haapajärven kaupunki ('City of Haapajärvi') > - Lemminkäinen Oyj	
L 09/10623 Helsingin kaupunki ('City of Helsinki') > -Lemminkäinen Oyj -VLT Trading Oy:n konkurssipesä	
L 11/11833 Hollolan kunta ('Municipality of Hollola') > - Lemminkäinen Oyj	Profit interest accrued starting from the day on which the relevant principal sum was received or, when so claimed by the claimant, starting from the day of the acceptance inspection unless the documents related to the acceptance inspection indicated that the price was still unpaid at that time point, or, when so claimed by the claimant, starting from another later day.
L 09/3828 Hyvinkään kaupunki ('City of Hyvinkää') > - Lemminkäinen Oyj	
L 09/9417 Iisalmen kaupunki ('City of Iisalmi') > -Lemminkäinen Oyj -VLT Trading Oy:n konkurssipesä	Profit interest accrued until the interest for late payment on the principal sum started to accrue.
L 11/10964 Imatran kaupunki ('City of Imatra') > - Lemminkäinen Oyj	
L 09/8891 Joensuun kaupunki ('City of Joensuu') > - Lemminkäinen Oyj	Interest for late payment on the principal sum was awarded (where claimed) with a rate based on the Interest Act Section 4(1). The Court evaluated whether the notification the claimant had presented in order to interrupt prescription (statutory limitation period) had been a notification fulfilling the requirements set in the Interest Act Section 7. <sup>400</sup> Generally, the prescription interrupting notification had not been elaborated enough to start the accrual of the interest for late payment. The start of accrual was thus decided on the basis of the Interest Act Section 9: accrual started from
L 08/17127 Jyväskylän kaupunki ('City of Jyväskylä') > - Lemminkäinen Oyj	
L 09/11596 Kaarinan kaupunki ('City of Kaarina') > - Lemminkäinen Oyj	
L 10/43991 Kajaanin kaupunki ('City of Kajaani') > -Lemminkäinen Oyj -NCC Roads Oy -Interasfaltti Oy, purettu, jatkettussa selvitystilassa	
L 11/2569 Kemijärven kaupunki ('City of Kemijärvi') > - Lemminkäinen Oyj - Skanska Asfaltti Oy	
L10/49370 Keravan kaupunki ('City of Kerava') > - Skanska Asfaltti Oy	
L 10/18651 Ent. Kiimingin kunta ('The former municipality of Kiiminki') > - Lemminkäinen Oyj	

<sup>397</sup> Judgments L 11/2572 Kemin kaupunki ('City of Kemi') and L 08/16911 Suomen valtio ('State of Finland') will not be discussed below as no damages were awarded.

<sup>398</sup> All the judgments listed in the table *are under appeal*. The appeals will be heard by the Helsinki Appellate Court.

<sup>399</sup> In the author's opinion, calling the awarded compensation differently is not likely to be relevant from the point of view of EU requirement for full compensation.

<sup>400</sup> The wording of the provision (7(1)) being 'the date on which the creditor presented his or her claim and provided such information on the grounds for and the amount of the compensation that can reasonably be required of him or her, taking also the debtor's possibilities to obtain such information into account. If the information is found insufficient only with regard to the amount of the debt, interest for late payment must, nevertheless, be paid for the part of the debt that can reasonably be found to be established'.

L 11/10959 Kouvolan kaupunki ('City of Kouvola') > - Lemminkäinen Oyj	the date on which a (complete) summons concerning the payment of the debt was served on the debtor (in joint liability, on the last debtor <sup>401</sup> ) or, regarding claims presented during court proceedings, from the date on which the claim was presented.
L 10/43993 Kuhmon kaupunki ('City of Kuhmo') > - Lemminkäinen Oyj	
L 09/42969 Kuopion kaupunki ('City of Kuopio') > - Lemminkäinen Oyj	The Court did not calculate the final amounts of interest but expressed the rates and rules according to which the interest is finally calculated. This is typical in Finnish judgments. For instance, the day on which interest for late payment ceases to accrue is not normally known at the time of the judgment.
L 09/9648 Lappeenrannan kaupunki ('City of Lappeenranta') > - Lemminkäinen Oyj	
L 09/10852 Lieksan kaupunki ('City of Lieksa') > - Lemminkäinen Oyj	
L 10/43997 Mikkelin kaupunki ('City of Mikkeli') > - Lemminkäinen Oyj	
L 09/11594 Naantalın kaupunki ('City of Naantali') > - Lemminkäinen Oyj	
L 10/28694 Nurmijärven kunta ('Municipality of Nurmijärvi') > - Skanska Asfaltti Oy - NCCRoads Oy	
L 10/24739 Oulun kaupunki ('City of Oulu') > -Lemminkäinen Oyj	
L 09/11363 Paimion kaupunki ('City of Paimio') > -Lemminkäinen Oyj	
L 10/18649 Porin kaupunki ('City of Pori') > -Lemminkäinen Oyj	
L 10/17217 Raaseporin kaupunki ('City of Raasepori') >-Lemminkäinen Oyj	
L 09/11591 Raisio kaupunki ('City of Raisio') > -Lemminkäinen Oyj -VLT Trading Oy:n konkurssipesä	
L 11/2570 Rovaniemen kaupunki ('City of Rovaniemi') > - Lemminkäinen Oyj - Skanska Asfaltti Oy	
L 10/49038 Salon kaupunki ('City of Salo') > -Lemminkäinen Oyj	
L 09/13094 Siilinjärven kunta ('City of Siilinjärvi') > - Lemminkäinen Oyj - Skanska Asfaltti Oy -VLT Trading Oy:n konkurssipesä	
L 11/2575 Sodankylän kunta ('Municipality of Sodankylä') > - Lemminkäinen Oyj -Skanska Asfaltti Oy -SA-Capital Oy	
L 10/43995 Suomussalmen kunta ('Municipality of Suomussalmi') > -Lemminkäinen Oyj -SA-Capital Oy	
L 08/16883 Tampereen kaupunki ('City of Tampere') > -Lemminkäinen Oyj	
L 09/11592 Turun kaupunki ('City of Turku') > - Lemminkäinen Oyj -VLT Trading Oy:n konkurssipesä	
L10/24357 Tuusulan kunta ('Municipality of Tuusula') > -Lemminkäinen Oyj	
L 09/47990 Vantaan kaupunki ('City of Vantaa') > - Lemminkäinen Oyj - Skanska Asfaltti Oy -VLT Trading Oy:n konkurssipesä - NCC Roads Oy - SA-Capital Oy - Rudus Asfaltti Oy - Super Asfaltti Oy	
L 08/17126 Äänekosken kaupunki	

<sup>401</sup> This is based on a Supreme Court judgment, see KKO 1968 II 101.

('City of Äänekoski') > -Lemminkäinen Oyj	
L 11/2573 Nivalan kaupunki ('City of Nivala') > -Lemminkäinen Oyj	In the case of Nivala, a detailed claim within the meaning of Section 7 of the Interest Act was considered to have been presented on 29.6.2010. Thus, interest for late payment started to accrue already when 30 days had passed after this date. (Interest for late payment accruing, hence, earlier than for many other claimants.) This claimant had claimed interest for late payment for accrued profit interest starting (only) from the date of summons, thus, this was the date when interest for late payment for <i>the accrued profit interest</i> started to accrue.

(FI.29) Other judgments related to private enforcement of competition law and interest: To this author's knowledge, there is no other publicly available competition restriction case law where damages would have been awarded plus interest issues discussed and ruled on in the judgment.<sup>402</sup> There is one major potentially interesting pending case, 'Raw wood damages claims' or 'Forest damages claims', (in particular, Helsinki District Court) which should be mentioned. A total of about 700 damages claims by raw wood sellers are pending after a buyer side competition restriction by major forestry actors (public enforcement decision by the Finnish Market Court in 2009). No substantive judgments – that would include analyzing the amount of damages or interest – have been awarded at the time of writing. Also the 'asphalt cartel saga' contains private enforcement cases which are still pending before the Helsinki District Court.

**4.2. Are the rules on the award of interest specific to the kinds of claim or general principles? Are there any specific approaches/rules that you can identify in national or EU competition cases, or in other cases where the claim is brought by business against business (B2B) and are there any specific approaches/rules in consumer versus business (C2B) cases?**

(FI.30) All the interest rules discussed in this report apply to claims on *monetary debts*. There are no specific approaches/rules that one could clearly identify in competition cases or B2B cases otherwise. See also the discussion on decided cases above. The general rules on interest should not, as a main rule, be applied differently when it comes to the distinction between B2B and other relationships.<sup>403</sup> However, in the Interest Act, B2C rules are included in the Section 2(2) on limitations to freedom of contract<sup>404</sup>, and Section 4(2) on limitations to the applicability of the exception rule on the amount of interest for late payment. Also Section 11 on adjusting the interest for late payment (if the debtor is a natural person and the debt is not related to the

<sup>402</sup> Earlier, pending or settled cases have been listed and discussed, for instance, in K. Havu – T. Kalliokoski, Kilpailuoikeudellinen vahingonkorvaus suomalaisessa lainsoveltamisessa ('Competition Restriction Damages in the Finnish Jurisdiction'), Defensor Legis 2009, 445–460, and dismissed claims have been discussed in K. Havu, The Helsinki District Court dismisses a damages action on concerted practices in spare car parts wholesale (Atoy v. Arwidson, HL Group, Koivunen, Kaha and Örum), e-Competitions Bulletin March 2014; The Helsinki District Court dismisses several damages actions against wood industry actors due to prescription (Laatikkala Oy, Metsäliitto Osuuskunta Stora Enso Oyj, and UPM-Kymmene), e-Competitions Bulletin March 2014.

<sup>403</sup> See, however, the wording of the Interest Act, Section 7: if the parties are businesses, the 'sufficient level of information' on the compensation debt may be affected. See also regarding B2B relations and interest for late payment, Directive 2011/7/EU: the Directive affects the rate of interest for late payment in situations defined by the Directive.

<sup>404</sup> Contracts concerning consumer credit or another consumer good or service or contracts according to which the debtor acquires accommodation for himself or the members of his family: an interest-related obligation is invalid in so far as the debtor would be liable to pay higher interest for late payment than laid down in Sections 4–11.



debtor's business activities) should be noted. A major source of other B2C rules is the Consumer Protection Act (38/1978, *Kuluttajansuojalaki* in Finnish), which includes rules on, for instance, consumer credits (Chapter 7<sup>405</sup>).

***Part V. Evaluation, interpretation in conformity with EU law, and intertemporal aspect***

**5.1. Throughout the reports, evaluate how satisfactory are the rules on the calculation of interest perceived to be? In considering this question, identify any law reform proposals in the last 15 years or so, or any major judgments by the higher courts that call into question or change some of the issues pertaining to the award of damages. Please identify changes of relevant national law on interest that will come into force or are currently considered.**

(FI.31) It should be noted that lack of clarity when it comes to the obligation to pay profit interest and its detailed contents when applied as a general principle<sup>406</sup> is often criticized in the legal literature. Precedents and other case law are called pointillist and incoherent.<sup>407</sup> When the Interest Act was drafted in 1982, profit interest was excluded from its scope at the last moment. Later (1983), Section 1(2)(4) explicitly noting the exclusion was added.<sup>408</sup> To this author's knowledge, no serious attempts to include rules on profit interest in the Interest Act have been made after these developments. The criminalization of cartels would most likely affect the point of time when *interest for late payment starts to accrue* (see the answer to question 9). To this author's knowledge, there are no other current highly relevant considerations or proposals.

**5.2. For each question, where it is relevant, assess the compliance of the national interest rules with the minimum standard prescribed by EU law ("full compensation"). If national law does not grant full compensation, please try to identify an interpretation of national law that guarantees full compensation in conformity with European law.**

(FI.32) See, in particular, 1.3, 1.5 and 4.1. In addition to remarks in other parts of the report, it should be noted that Finnish law on compensating damages is based on the principle of full compensation. As to the EU requirement of full compensation as such, it may be pointed out that the detailed relationship of the requirement to the evaluation of causal connection – where national law still plays a significant role – is not completely clear. The EU requirement of full compensation is without relevance in the context of losses which are not considered causally connected to the competition restriction.<sup>409</sup> Rules on interest and rules or principles according to which it is decided whether a type of loss is causally connected may have a partial overlapping area. Moreover, the obligations of the courts and parties to a case are not completely evident on the basis of EU law either. One could state that failure by a party to claim all the possible 'compensation heads', *including different interest types*, and a resulting decision including compensation other than full would not amount to an infringement by the national court of the principle of full compensation.<sup>410</sup> One of the most relevant themes as

<sup>405</sup> Note: based on an amendment (746/2010) which is not included in the latest available English translation.

<sup>406</sup> See the cases discussed under questions 2,4 and 7.

<sup>407</sup> See, for instance, Norros 2012, 168–177.

<sup>408</sup> See preparatory works HE 64/1983 vp, 3.

<sup>409</sup> See, for instance, Joined cases C-295/04 to C-298/04 *Manfredi*, paras 60–64 and 90–100. Moreover, the Directive (2014/104/EU) does not fully explain the detailed relationship of full compensation and evaluation of causal connection.

<sup>410</sup> The CJEU has not stated that national courts would be under an obligation to award more or make awards with different contents compared to what the parties claimed.

regards full compensation and the relationship of EU and Finnish law may be the obligation to pay profit interest and its possible rates. It may be stated that compliance with the EU requirement of full compensation would require an award of profit interest (if claimed) with a satisfactory rate which takes into account the *relevant loss of investment profit*.<sup>411</sup> In the legal literature, the obligation to pay (any) interest is considered as a means of arriving at full compensation.<sup>412</sup> Detailed discussion on the relationship between the idea of full compensation and rules on interest seems to be absent in the Supreme Court case law, and the national principle of full compensation does not seem to take precedence over particular rules on interest.<sup>413</sup> However, if loss of profit is claimed to be compensated formulating the claim in a manner where loss of profit is entirely constructed without mentioning interest, and the court awards damages which compensate for loss of profit, the obligation to pay profit interest *calling this obligation an interest payment* is probably not needed to comply with EU law (or the national) principle of full compensation.<sup>414</sup>

- (FI.33) Especially as regards the specific competition damages context and national specific provisions on compensating damages caused by competition restrictions it is possible that compensation corresponding to the effect of compound interest could be awarded even now by interpreting the specific damages provisions and law on interest in the light of EU law requiring full compensation. This is also possible in the context of other legislative bases for claims, but the explicit references to competition law and EU competition law in the specific damages provisions may make those provisions especially open for EU competition law or competition law influences.<sup>415</sup>

**5.3. Finally, when assessing the overall compliance of national law with the principle of full compensation based on directly applicable EU law, please confirm that national courts have to apply it also in relation to past infringements of EU competition law or the equivalent provisions of the EEA agreement (e.g. cartels starting in the 1990ies and ending in the 2000er years).**

- (FI.34) National courts must apply EU competition law (or equivalent law which was in force at the time of the infringement) and EU level case law also to past infringements of EU law.<sup>416</sup>

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<sup>411</sup> Nevertheless, early detailed claims for compensation (which fulfill the requirements set by Section 7 of the Interest Act) allow the claimant-friendly *interest for late payment* to accrue since an early date.

<sup>412</sup> See P. Ståhlberg – J. Karhu, Suomen vahingonkorvauslainsäädäntö (The Finnish Law on Compensating Damages) 2013, 440 and 448.

<sup>413</sup> See, for instance, KKO 2002:44.

<sup>414</sup> That is, regardless of the way the compensation sum is constructed and called, most likely what matters is that all losses are compensated for. EU law does not require compensation which would exceed losses suffered. One could state that it is unlikely that the requirement to include interest, as presented in the case law by the CJEU, would signify that the profit type of interest should be included even though all losses would already be compensated for otherwise. See also the description of the Helsinki District Court asphalt judgment.

<sup>415</sup> See, for instance, the Helsinki District Court asphalt cartel judgment concerning the claims by city of Espoo (L 09/49467), page 255 *et seq.* (section 4.5.4 *et seq.*) and, for instance, pages 277–292 (sections 5.4.2.2–).

<sup>416</sup> Finland joined the EU in 1995 and the EEA in 1994.

**5.4. Regarding the secondary subject of investigation (interest on damages due to infringements of national competition law only): The proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (2013/0185 (COD)), if adopted, would make the rules of European Law as outlined above applicable to infringements of national competition law. Recital 12 of the preamble summarises those as follows:**

(FI.35) “Anyone who has suffered harm caused by an infringement can claim compensation for the actual loss (*damnum emergens*), for the gain of which he has been deprived (loss of profit or *lucrum cessans*) plus interest. This is irrespective of whether the national rules define these categories separately or in combination. The payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time, and it should be due from the time the harm occurred until compensation is paid, without prejudice to the qualification of such interest as compensatory or default interest under national law. This is also without prejudice to whether effluxion of time is taken into account as a separate category (interest) or as a constituent part of actual loss of profit. It is incumbent on the Member States to lay down the rules to be applied for that purpose.”

**5.5. Would the right to full compensation as set out by recital 12 of the proposed directive apply to interest calculation for damages in cases where only national competition law has been infringed and the damage occurred before the implementation of the directive came into force?**

(FI.36) It is likely that in the case of damages occurring because of an infringement of purely national law before implementation this would not apply directly. For instance, the interest rates which follow from statutes seem to take precedence over more flexible ideas of full compensation.<sup>417</sup> Moreover, the starting point of accrual is dictated by particular rules the results of which may also differ from that required by the future Directive Article. It is possible that this rule of the Directive would indirectly affect *interpretations in unclear situations*, for instance, as regards the point of time when interest for late payment starts to accrue, the obligation to pay profit interest and, possibly, the rate of such interest.

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<sup>417</sup> See also 5.2 and 4.1 and, regarding rates and claims, 1.3 and 2.1.

### ***Appendices***

Kauppalaki (355/1987) as it is in force at the time of the writing, obtained from Finlex Statutes Database (access in English <http://www.finlex.fi/en/>), and a Translation, English, Sale of Goods Act (355/1987), the latest translation provided in the database of Statutes, obtained from Finlex Statutes Database, Translations.

Korkolaki (633/1982) as it is in force at the time of the writing, obtained from Finlex Statutes Database (access in English <http://www.finlex.fi/en/>), and a Translation, English, Interest Act (633/1982), the latest translation provided in the database of Statutes, obtained from Finlex Statutes Database, Translations.

Kuluttajansuojalaki (38/1978) as it is in force at the time of the writing, obtained from Finlex Statutes Database (access in English <http://www.finlex.fi/en/>), and a Translation, English, Consumer Protection Act (38/1978), the latest translation provided in the database of Statutes, obtained from Finlex Statutes Database, Translations.

Oikeudenkäymiskaari (4/1734) as it is in force at the time of the writing, obtained from Finlex Statutes Database (access in English <http://www.finlex.fi/en/>), and a Translation, English, Code of Judicial Procedure (4/1734), the latest translation provided in the database of Statutes, obtained from Finlex Statutes Database, Translations.

Velkakirjalaki, Promissory Notes Act (622/1947) is not available as an even relatively current English translation. The Finnish Act is appended.



## France

Rafael Amaro\*

### *Preliminary Matters*<sup>418</sup>

- (FR.1) As in other EU Member States, in the French legal system, competition law claims for damages are twofold: they can be brought to court by stand-alone or follow-on actions. No distinction is made between these two kinds of actions, with one exception, which is not relevant for this report<sup>419</sup>.
- (FR.2) No distinction is made between breaches of national and EU competition rules.
- (FR.3) Claims for damages relating to competition law are governed by the *Code civil*'s general rules governing liability (*le droit commun de la responsabilité civile*). The lack of abundant case law related to competition litigation is thus not an issue as it is valuable to rely on the principles set out in other kinds of litigation.
- (FR.4) **The following developments focus on monetary debts.** Other rules apply for non-monetary remedies but they are not relevant in the context of damages actions for breach of competition rules.

(FR.5) Under French law, the *summa divisio* is to be made between interest for a “pre-existing obligation” and interest for an “obligation declared by judgment”. The first one is governed by Article 1153 of the *Code civil* and the latter is governed by Article 1153-1 of the same code (introduced by the “*Loi Badinter*”: Act No. 85-677 of July 5th, 1985). Note that most B2B contracts will be ruled by Article L. 441-6, I, alinéa 8 of the *Code de commerce*.

- (FR.6) **The archetype of a “pre-existing obligation” is the contractual obligation (*obligation contractuelle*).** It is called “pre-existing” because its existence and its *quantum* do not depend upon a judgment but upon the contract (or upon statutory provisions). It is the breach of contract (or the automatic effect of the statutory provisions) that justifies the payment of a certain amount of money and the interest corresponding to the debtor's delay to pay this amount. **The archetype of an “obligation declared by judgment” is the tortious obligation (*créance extra-contractuelle / délictuelle*).** The difference to the pre-existing obligation is that the court's intervention is required to make the debt **certain, of a fixed amount and payable** (*certaine, liquide et exigible*)<sup>420</sup>. In other words, the key element to draw the line between “pre-existing obligation” and “obligation declared by judgment” is the intervention of the court.

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<sup>418</sup> A glossary and abbreviation table is at the end of the report.

<sup>419</sup> Article L. 423-17 C. consom. provides that class actions are allowed only for follow-on litigation.

<sup>420</sup> Cass. ass. plén., 2 avr. 1993, no 89-15.490, *Bull. ass. plén.*, no 9; *D.*, 1993. 373, concl. Jéol; *D.* 1994. Somm. 14, obs. Aubert; see also: Cass. civ. 1<sup>ère</sup>, 29 nov. 2005, no 03-16.530; *Bull. civ. I*, no 449; Cass. civ. 1<sup>ère</sup>, 14 oct. 2010, no 09-12.921; *Bull. civ. I*, no 199.

It is noteworthy that a tortious obligation can be qualified as “pre-existing” if, under certain circumstances, statutory provisions hold liable a person without the need for court action (as in Labour legislation for instance, where out-of-court compensation is frequent). In the same way, a contractual obligation can be considered as an “obligation declared by judgment” if a judgment is necessary to make this obligation certain, of a fixed amount and payable.

(FR.7) That said, in the current state of play, cartel damage claims should exclusively involve the second figure: “obligation declared by judgment” ruled by Article 1153-1 of the *Code civil*. It results that neither Article 1153 of the *Code civil*, nor Article L. 441-6, I, alinéa 8 of the *Code de commerce* will be applicable.

(FR.8) So far, few doctrinal works have focused on the question of interest.

Similarly, French courts usually address it superficially in their decision on the merits – when they address it – because it is considered as a matter of enforcement dealt with by courts specialised to decide on enforcement issues: the *juge de l'exécution* (as opposed to the *juge du fond* that decides on the merits of the case). To my knowledge, none of the few decisions issued by French courts in cartel damage litigation addressed the question of interest. This unfortunate lack of case law is not surprising the previous observation.

## Section I. General Principles

### 1.1. What is interest? Is there a definition?

(FR.9) There is no legal definition of interest but the leading legal dictionary (the « *Cornu* ») defines them as:

“Money income, profit generated by capital (placed, loaned or due under an agreement or condemnation)” (“Revenus de l’argent, profit rapporté par un capital (place, prêté ou dû en vertu d’une convention ou d’une condamnation)”) <sup>421</sup>.

(FR.10) This definition coincides with the so-called **moratory (or default) interest** (*dommages et intérêts moratoires*). The leading case law and academic opinions endorse that it should be distinguished from the *dommages et intérêts compensatoires* which is a widespread but inaccurate synonym of “compensation” or “damages” when used in the context of tortious liability (*responsabilité extra-contractuelle*).

### 1.2. When, and under what conditions, is interest payable at all? Does this depend on whether the claim is brought in tort, breach of contract or (where applicable) restitution/unjust enrichment?

(FR.11) The conditions for interest payment depend upon the type of obligation: pre-existing obligation or obligation declared by a judgment. Whether the claim is brought in tort, breach of contract or unjust enrichment is relevant only to the extent that each type of claim fits better with each type of obligation (contractual obligation: pre-existing obligation or tortious obligation: obligation declared by a judgment). Concerning the répétition de l’indu under Article 1376 Code Civil <sup>422</sup>, it is rather unlikely that French courts will apply it to damages claims. So far, French courts have always applied Article 1382 Code Civil (tort law).

<sup>421</sup> v° “Intérêt”, G. Cornu, Ass. H. Capitant, *Vocabulaire juridique*, PUF, 2007.

<sup>422</sup> Article 1376 C. civ.:

- (FR.12) **The relevant legal provisions are those of Article 1153, 1153-1, 1154 and 1155 of the *Code civil* and Article L. 441-6, I, alinea 8 of the *Code de commerce* for B2B contracts, reproduced hereunder, that lay down the main principles of interest in French Law.**

**Code civil**

Translation from the official website: [legifrance.gouv.fr](http://legifrance.gouv.fr):

**Article 1153<sup>423</sup>:** In obligations consisting only in the payment of a certain sum of money, damages resulting from delay in the performance shall consist only in a judgment for the payment of interest at the statutory rate, except for the special rules concerning commerce and suretyship.

Such damages are due without the creditor having to prove any loss.

They are due only from the day of the formal demand to pay or of another equivalent act such as a personal letter clearly stating a demand, except in those instances where the law causes them to accrue as a matter of right.

A creditor, to whom his debtor in delay has caused by his bad faith a loss independent of the loss due to the delay, may obtain damages distinct from the moratory damages owed on the debt.

**Article 1153-1<sup>424</sup>:** In all instances, a judgment of damages carries with it interest at the statutory rate even in the absence of a claim for it or of a specific provision in the judgment. Unless otherwise provided by law, such interest accrues from the pronouncing of the judgment unless the judge rules otherwise.

When a judgment of damages for compensation of a loss is unreservedly upheld by an appellate judge, such compensation will as a matter of law carry with it interest as from the judgment of first instance. In other instances, the compensation awarded on appeal carries with it interest from the date of the appellate judgment. The appellate judge may always derogate from the provisions of this paragraph.

(Contd.) \_\_\_\_\_

« *He who receives by error or knowingly what is not owed to him is bound to make restitution to the person from whom he has unduly received it* ». Original text in French: « *Celui qui reçoit par erreur ou sciemment ce qui ne lui est pas dû s'oblige à le restituer à celui de qui il l'a indûment reçu* ». Under French law, the one who received, in bad faith, what is not owed to him, he is obliged to reconstitute the principal amount, the interest and the fruits obtained as from the date of the undue payment.

<sup>423</sup> Article 1153 C. civ.:

« al.1. Dans les obligations qui se bornent au paiement d'une certaine somme, les dommages-intérêts résultant du retard dans l'exécution ne consistent jamais que dans la condamnation aux intérêts au taux légal, sauf les règles particulières au commerce et au cautionnement.

al. 2. Ces dommages et intérêts sont dus sans que le créancier soit tenu de justifier d'aucune perte.

al. 3. Ils ne sont dus que du jour de la sommation de payer, ou d'un autre acte équivalent telle une lettre missive s'il en ressort une interpellation suffisante, excepté dans le cas où la loi les fait courir de plein droit.

al. 4. *Le créancier auquel son débiteur en retard a causé, par sa mauvaise foi, un préjudice indépendant de ce retard, peut obtenir des dommages et intérêts distincts des intérêts moratoires de la créance. »*

<sup>424</sup> Article 1153-1 C. civ.:

« al. 1. En toute matière, la condamnation à une indemnité emporte intérêts au taux légal même en l'absence de demande ou de disposition spéciale du jugement. Sauf disposition contraire de la loi, ces intérêts courent à compter du prononcé du jugement à moins que le juge n'en décide autrement.

al. 2. *En cas de confirmation pure et simple par le juge d'appel d'une décision allouant une indemnité en réparation d'un dommage, celle-ci porte de plein droit intérêt au taux légal à compter du jugement de première instance. Dans les autres cas, l'indemnité allouée en appel porte intérêt à compter de la décision d'appel. Le juge d'appel peut toujours déroger aux dispositions du présent alinéa. »*



**Article 1154**<sup>425</sup>: Interest due on assets may produce interest either as a result of a judicial claim or on the ground of a special agreement, provided that either in the claim or in the agreement the interest concerned is owed at least for one whole year.  
(Article 1155 is not relevant here)

### Code de commerce

**Article L. 441-6, I, alinéa 8**<sup>426</sup>: The payment terms must specify the terms of application and the interest rate of the penalties for late payment due on the day after the date of payment shown on the invoice as well as the amount of the fixed charge to cover debt collection costs due to the creditor where the sums due are paid after this date. Unless otherwise provided, but at a rate that cannot be lower than three times the legal interest rate, this rate is equal to the interest rate applied by the European Central Bank to its most recent refinancing operation plus 10 percentage points. In this case, the applicable rate concerned during the first half of the year will be the rate in force as at 1 January of the year in question. For the second half of the year concerned, the rate applied shall be the rate in force on 1 July of the year in question. Penalties for late payments shall be due without the need for a reminder. All professionals who have outstanding payments shall automatically owe the creditor a fixed charge to cover recovery costs, the amount of which is fixed by decree. When the recovery costs exposed are higher than the amount of this fixed charge, the creditor may ask for additional compensation, on production of evidence. Nevertheless, the creditor may not benefit from this compensation when safeguarding, judicial restructuring or liquidation proceedings prohibit the payment of the claim due to it on the due date.

(FR.13) **For pre-existing obligation, Article 1153 of the Code civil applies** and grants the creditor **default interest**. Its provisions, completed by the case-law (*jurisprudence*), lay down the following solutions:

- The base to calculate interest is the monetary amount of the unpaid debt.
- Interest is calculated on the basis of a **statutory rate** (*taux d'intérêt légal*)<sup>427</sup>. See also answer to question 2.1.
- The creditor does not have to prove any loss to receive interest<sup>428</sup>. See also point answer to question 1.4.
- The creditor does not need to formulate any specific request to receive interest<sup>429</sup>. But for compound interest see answer 2.2.

<sup>425</sup> Article 1154 C. civ.: « Les intérêts échus des capitaux peuvent produire des intérêts, ou par une demande judiciaire, ou par une convention spéciale, pourvu que, soit dans la demande, soit dans la convention, il s'agisse d'intérêts dus au moins pour une année entière. »

<sup>426</sup> Article L. 442-6, I, alinéa 8 C. com.: « Les conditions de règlement doivent obligatoirement préciser les conditions d'application et le taux d'intérêt des pénalités de retard exigibles le jour suivant la date de règlement figurant sur la facture ainsi que le montant de l'indemnité forfaitaire pour frais de recouvrement due au créancier dans le cas où les sommes dues sont réglées après cette date. Sauf disposition contraire qui ne peut toutefois fixer un taux inférieur à trois fois le taux d'intérêt légal, ce taux est égal au taux d'intérêt appliqué par la Banque centrale européenne à son opération de refinancement la plus récente majoré de 10 points de pourcentage. Dans ce cas, le taux applicable pendant le premier semestre de l'année concernée est le taux en vigueur au 1er janvier de l'année en question. Pour le second semestre de l'année concernée, il est le taux en vigueur au 1er juillet de l'année en question. Les pénalités de retard sont exigibles sans qu'un rappel soit nécessaire. Tout professionnel en situation de retard de paiement est de plein droit débiteur, à l'égard du créancier, d'une indemnité forfaitaire pour frais de recouvrement, dont le montant est fixé par décret. Lorsque les frais de recouvrement exposés sont supérieurs au montant de cette indemnité forfaitaire, le créancier peut demander une indemnisation complémentaire, sur justification. Toutefois, le créancier ne peut invoquer le bénéfice de ces indemnités lorsque l'ouverture d'une procédure de sauvegarde, de redressement ou de liquidation judiciaire interdit le paiement à son échéance de la créance qui lui est due. »

<sup>427</sup> Article 1153 alinéa 1 C. civ.

<sup>428</sup> Article 1153, alinéa 2 C. civ.

<sup>429</sup> Cass. soc., 19 mars 1987, no 84-43.567, *Bull. civ. V*, no 173.

- Except for specific matters that are not relevant in the context of competition litigation, **interest is due from the day the creditor issues a formal demand to pay**. This demand can be formulated by:
  - o a commandment to pay (*somation de payer*) or an equivalent act that removes any doubts that the creditor wants the debtor to make payment<sup>430</sup>;
  - o a claim filed in court<sup>431</sup>.
- Moratory damages do not preclude **compensatory damages** for the loss caused by the debtor in delay's bad faith<sup>432</sup> that the creditor may be able to prove.

(FR.14) For obligation declared by judgment, Article 1153-1 of the *Code civil* applies. It grants the creditor **default interest** as Article 1153. Its provisions, completed by the case-law, lay down the following solutions:

- Each obligation declared by judgment produces interest at the **statutory rate** "even in the absence of a claim for it or of a specific provision in the judgment"<sup>433</sup>.
- **Interest accrues from the day the judgment is issued, "unless the judge rules otherwise"**<sup>434</sup>.
- **When the court "rules otherwise", it may decide that interest accrues before or after the judgment.** The Cour de cassation shall not control this decision as it is at the lower courts' discretion (*appréciation souveraine des juges du fond*) that do not have to state the grounds for their decisions<sup>435</sup> nor ask the litigants to make a plea on this point<sup>436</sup>. The court may bring forward the starting point to calculate interest **at the day the writ is issued by the claimant**<sup>437</sup> or **at the day the event from which the loss resulted thereby occurred**. The court may also postpone this starting point to the day the judgment is notified to the party ordered to pay.

In case a court of appeal upholds a first instance judgment, interest accrues from the day the judgment of first instance is issued. The appellate judge may also derogate from this rule as can its first instance counterparts<sup>438</sup>.

(FR.15) **Article 1154 allows compound interest, called *anatocisme*, after one year-delay. It applies to both types of obligation. Compound interest starts to accrue the day the debt is due, i.e. during the first year, the debt produces interest, but it could be asked only after this one year-delay. In other words, if the debtor makes payment before the one year-delay is reached, no compound interest will be awarded to the creditor.**

If it has not been agreed between the parties, the capitalisation of interest should be requested by an *ad hoc* demand to the court<sup>439</sup>.

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<sup>430</sup> Article 1153 alinéa 3 C. civ.

<sup>431</sup> Cass. com, 25 mai 1982, no 80-10.108, *Bull. civ.* IV, no 196.

<sup>432</sup> Article 1153, alinéa 4 C. civ.

<sup>433</sup> Article 1153-1 alinéa 1 *in limine* C. civ.

<sup>434</sup> Article 1153-1 alinéa 1 *in fine* C. civ.

<sup>435</sup> Cass., ass. plén., 3 juill. 1992, no 90-83.430, *Bull. ass. plén.*, no 7; *JCP* 1992. 21898, concl. Dontenwille et note Perdriau; *D.* 1992. Somm. 404, obs. Penneau; *Defrénois* 1992. 1453, obs. Aubert; *Crim.* 28 nov. 1994, no 94-80.837, *Bull. crim.*, no 379; *JCP* 1995. IV. 635; Cass. civ. 2<sup>e</sup>, 20 juin 2002, no 99-18.603, *Bull. civ.* II, no 141; *Dr. et patr. nov.* 2002. 108, obs. Chauvel.

<sup>436</sup> Cass. civ. 2<sup>e</sup>, 20 juin 1990, no 89-10.347, *Bull. civ.* II, no 141; *RTD civ.* 1991. 350, obs. P. Jourdain; *RTD civ.* 1991. 395, obs. J. Normand.

<sup>437</sup> see e. g. Cass. civ. 1<sup>ère</sup>, 28 avr. 1998, *D. Affaires* 1998. 949; *Defrénois* 1998. 1049, note Aubert; *RTD civ.* 1998, p. 920, obs. P. Jourdain.

<sup>438</sup> Article 1153-1 alinéa 2 C. civ.

<sup>439</sup> Cass. civ. 1<sup>ère</sup>, 14 oct. 2010, no 09-68.026, *Bull. civ.* 2010, I, no 203; Cass. soc., 30 janv. 2013, no 11-13.286; *JurisData* no 2012-032504, *Bull. civ.* V, no 25.

- (FR.16) The statutory rate is not considered as being a public policy provision (*disposition d'ordre public*) and the parties may therefore substitute it with a contractual rate of their choice<sup>440</sup> or any other means of compensation for the delay (such as damages corresponding to the harm actually suffered or a penalty clause). If the conventional rate clause is declared void, the statutory rate replaces it<sup>441</sup>.
- (FR.17) **Aggravated interest** (*intérêts majorés*). To increase the pressure on the debtor and oblige him to pay his debt off, Article L. 313-3 alinea 1 of the *Code monétaire et financier* provides that the statutory rate is **increased by five points at the end of a period of two months** from the day the judgment becomes enforceable.

**These provisions only apply to obligation declared by judgment.**

**Code monétaire et financier**

**Article L. 313-3<sup>442</sup>**

In the event of a financial penalty being imposed by a court decision, the legal interest rate is increased by five points when two months have elapsed since the court's decision became enforceable, if only as a provision. This effect is attached as of the right to an adjudication of forced sale upon seizure of real property, four months after its delivery.

At the request of the debtor or the creditor, however, and in view of the debtor's situation, the enforcement judge may exempt the debtor from said increase or reduce the amount thereof.

It follows from Article L. 313-3 alinea 2 of the *Code monétaire et financier* that **courts are entitled to decrease or even suppress the aggravated interest**<sup>443</sup>. In doing so, courts enjoy a wide margin of appreciation granted by the *Cour de cassation* who does not control their ruling (*appreciation souveraine des juges du fond*). Alinéa 2 of Article L. 313-3 is an exception to the principle set out in Alinéa 1 of the same Article.

- (FR.18) Claimants could also bring their actions in *repetition de l'indu* ruled by Article 1376 of the *Code civil* (the French concept of restitution) but there is no conclusive evidence whether French courts would apply this provision at all to damages claims.

<sup>440</sup> Cass. com., 15 mars 1971, no 68-12.172, *Bull. civ. IV*, no 79; Cass. com., 17 mars 1981, no 79-13.733, *Bull. civ. IV*, no 142; Cass. com., 14 oct. 1981, no 80-12.488, *Bull. civ. IV*, no 358; Cass. com., 9 nov. 1982, no 80-16.473, *Bull. civ. IV*, no 341; Cass. com., 11 juill. 1984, no 82-16.387, *Bull. civ. IV*, no 229; Cass. civ. 1<sup>ère</sup>, 20 oct. 1987, no 86-10.923, *Bull. civ. I*, no 273; Cass. com., 11 juin 1991, no 89-11.727, *Bull. civ. IV*, no 216

<sup>441</sup> Cass. civ. 1<sup>ère</sup>, 24 juin 1981, no 80-12.903, *Bull. civ. I*, no 234; Cass. com., 31 mai 1983, no 81-16.493, no 82-10.312, *Bull. civ. IV*, no 161; Cass. com., 29 mai 1984, no 83-10.617, *Bull. civ. IV*, no 180

<sup>442</sup> Article L. 313-3:

« al. 1. En cas de condamnation pécuniaire par décision de justice, le taux de l'intérêt légal est majoré de cinq points à l'expiration d'un délai de deux mois à compter du jour où la décision de justice est devenue exécutoire, fût-ce par provision. Cet effet est attaché de plein droit au jugement d'adjudication sur saisie immobilière, quatre mois après son prononcé.

al. 2. Toutefois, le juge de l'exécution peut, à la demande du débiteur ou du créancier, et en considération de la situation du débiteur, exonérer celui-ci de cette majoration ou en réduire le montant. »

<sup>443</sup> Cass. Civ. 2<sup>e</sup>, 6 juin 2013, no 12-20.129; *Bull. civ. II*, no 903.

### 1.3. Is payment of interest compulsory or at the discretion of the court?

(FR.19) Payment of interest is compulsory on the ground of Article 1153 and Article 1153-1 of the *Code civil*.

(FR.20) A margin of appreciation is granted to the court when awarding simple or aggravated interest for an obligation declared by judgment. See answer to question 1.2.

### 1.4. What is said to be the purpose of the interest payment?

(FR.21) It is usually said that default interest payment serves two purposes:

- It compensates the efflux of time related to the debtor's delay in performing its obligation and the lost opportunity the creditor had to make profit with the money he did not receive<sup>444</sup>. When calculated by reference to the statutory rate (see answer to question 2.1) interest works as a lump sum designed to compensate the creditor's lost income caused by the fact he did not have the capital at his disposal.
- It is also a mean of pressure to make the debtor pay his debt.

Some scholars argue that these two purposes are irreconcilable and should be distinguished in two separate legal devices<sup>445</sup>. However the statutory provisions and the case law do not echo these doctrinal remarks and keep considering default interest as a sole legal notion.

**It has also been asserted that the lump-sum scheme governing default interest is at odd with the full-compensation principle on which French tort law rests<sup>446</sup>.** While French courts usually enjoy a wide margin of appreciation when estimating damages, this margin is set aside when the damages result in a debtor's delay in paying off a sum of money that might be regarded as inconsistent. See answer to question 5.4.

(FR.22) It has been specified that an interest payment does not compensate the currency depreciation. The Cour de cassation ruled that:

"The inflation-indexed actualisation only compensates the currency depreciation from the day the claim is evaluated and the day of payment default interest while moratory interest only compensates the delay in the payment of the amount due."<sup>447</sup>

**In other words, the claimant may be awarded damages for the currency depreciation and damages for the loss resulting in the debtor's delay to pay off.**

<sup>444</sup> See e. g. G. Viney, P. Jourdain, *Les effets de la responsabilité civile*, Traité de droit civil, LGDJ, 2010, no 334: "In addition to the compensatory damages that compensate the harm caused by the act attributable to the author, the court may award the victim damages that repair the loss resulting from the delay in the payment of a sum of money. The deprivation of this sum indeed induces the creditor financial loss corresponding to the investment interest of uncollected funds." (« *En dehors des dommages-intérêts compensatoires, qui indemnisent le préjudice causé par le fait générateur imputable au responsable, le juge peut allouer à une victime des dommages-intérêts qui réparent un autre préjudice résultant du retard dans le paiement d'une somme d'argent. La privation de cette somme induit en effet pour le créancier une perte financière correspondant aux intérêts de placement des fonds non perçus.* »)

<sup>445</sup> F. Gréau, *Recherche sur les intérêts moratoires*, Defrénois, coll. des thèses, t. 21, 2006, préf. F. Chabas; L. Raschel, *Le droit processuel de la responsabilité civile*, Bibl. IRJS, t. 25, 2010, préf. L. Cadiet, no 467 et s.

<sup>446</sup> F. Gréau, *op. cit.*, no 17 *seq.*, spec. no 59.

<sup>447</sup> Cass. civ. 1<sup>ère</sup>, 6 juin 2000, n° 97-14.965, *Bull. civ. I*, n° 170 : « *L'actualisation par l'effet de l'indexation compense la seule dépréciation monétaire entre le jour où la créance est évaluée et le jour du paiement tandis que les intérêts moratoires indemnisent seulement le retard dans le paiement de la somme due* ».

**1.5. What is the legal basis for the payment of interest (statutes, contractual agreements, case-law, soft law guidance)?**

(FR.23) The legal basis for the payment of interest could be contractual agreements (*see answer to question 1.3*) or statutes (*see answer to question 1.2*) if the parties have not agreed on a contractual rate or if this rate is illegal.

**Section II. Calculation of Interest**

**2.1. What is the rate of interest that is set? How is it arrived at? Are there statutes?**

(FR.24) Article L. 313-2, alinea 1 of the *Code monétaire et financier* states that:

“The legal interest rate is, for all purposes, set by decree of the minister in charge of the economy.”

The Government regulation (*ordonnance*) No. 2014-947 of 20th August 2014 inserted two major innovations.

Firstly, it has reformed the calculation of the statutory rate set by Article L. 313-2 of the *Code monétaire et financier*. Since the 1st January 2015, there are two different rates: one applies when the creditor is a non-professional (a person not acting for business purposes), the second applies in all other cases.

Secondly, the *ordonnance* prescribes that the statutory rate will be updated every six months, depending on the rate of the European Central Bank's main refinancing operations and the rates charged by credit institutions and finance companies.

(FR.25) The statutory rates of interest for 2015 are indicated in the table below:

Debtor	Creditor	Rate for the 1 <sup>st</sup> semester 2015	Rate for the 2 <sup>nd</sup> semester 2015 (Arrêté du 24 juin 2015 relatif à la fixation du taux de l'intérêt légal)
Non-professional	Non-professional	4.06 %	4,29 %
Professional	Non-professional	4.06 %	4,29 %
Non-professional	Professional	0.93 %	0.99 %
Professional	Professional	0.93 %	0.99 %

<https://www.service-public.fr/particuliers/vosdroits/F783> (French administration official website)

The following formula is given as an example for non-leap years and for matters ruled by the general principle (*droit commun*) of the French Code civil

*Interest are calculated pursuant the following formula:*

**(FR.1)      (Debt x delay in days x statutory rate) / (365 x 100)**

Example: simple interest

- Date of the judgment: 01.05.2015
- Debt: condemnation to pay 5,000 €
- Type of relationship: B2B
- Statutory rate in 2015: 0.93 %
- Date of the payment (and end of the accrual of interest): 30.05.2015

$$(5,000 \times 29 \times 0.93) / (365 \times 100) = 3.69 \text{ €}$$

**The debtor will pay 5,003.69 €**

From	To	Amount	Interest Rate	Total Days	Days in Year	Interest
01/05/2015	30/05/2015	5,000.00	0.93%	29	365	3.69

Total Interest	3.69
<b>Total Debt</b>	<b>5003.69</b>

Example: simple + majored + compound interest

- Date of the judgment: 01.09.2013
- Debt: condemnation to pay 5,000 €
- Type of relationship: B2B
- Statutory rate in 2013: 0.04 %
- Statutory rate in 2014: 0.04 %
- Statutory rate in 2015: 0.93 %
- Date when aggravated interest starts to accrue: 01.11.2013
- Aggravated interest starts to accrue 2 months after the date of the judgment
- Date of the payment (and end of the accrual of interest): 30.03.2015
- We assume that the claimant asks for the compound interest to be paid
- Compounding starts to apply exactly 1 year after the date of the claim
- The principal amount for the first compounding is the damage amount plus the simple interest accrued thus far

Example #2 (01/09/2013 - 31/08/2014)

From	To	Amount	Interest Rate	Total Days	Interest	Days in Year
01/09/2013	30/10/2013	5000,00	0,04%	60	0,33	365
01/11/2013	31/12/2013	5000,00	5,04%	61	42,12	365
01/01/2014	31/08/2014	5000,00	5,04%	242	167,08	365
					<b>209,52</b>	
					<b>5209,52</b>	

Example #2 (01/09/2014 - 31/12/2014)

From	To	Amount	Interest Rate	Total Days	Interest	Days in Year
01/09/2014	31/12/2014	5209,52	5,04%	122	86,33	365
					86,33	
					5295,85	

Example #2 (01/01/2015 - 31/03/2015)

From	To	Amount	Interest Rate	Total Days	Interest	Days in Year
01/01/2015	31/03/2015	5297,28	5,93%	89	74,94	365
					5372,22	

**2.2. Is interest simple or compound? If the interest is neither simple nor compound as defined above, please elaborate.**

(FR.26) Interest may be **simple**, **compound** (*anatocisme*) or **aggravated** (*intérêts majorés*).

See answer to question 1.2.

**2.3. What is the time for which interest is calculated? When does interest start to accrue, when does the accrual of interest end? Are there any situations where the action of the plaintiff, for example delay on his part, serves to change the time for which interest is calculated? Are there provisions for suspension of the accrual of interest?**

(FR.27) Interest starts to accrue:

- the day the demand to pay is issued by the creditor (for pre-existing obligation governed by Article 1153 of the *Code civil*); or
- the day the judgment is issued or another day which was decided by the judge (for obligation declared by judgment governed by Article 1153-1 of the *Code civil*).

(FR.28) The accrual of interest ends when the debt is paid.

(FR.29) The claimant's behaviour may change the time for which interest is calculated if:

- the claimant delays his demand to pay (for pre-existing obligation governed by Article 1153 of the *Code civil*)
- the claimant retards the judgment by its litigation strategy (for obligation declared by judgment governed by Article 1153-1 of the *Code civil*)

(FR.30) There are no general provisions for suspension of the accrual of interest but courts may lower or suppress aggravated interest. See answer to question 1.2.

**2.4. Are there any specific provisions if payment is requested in a different currency than the currency of the state where the lawsuit is brought? (e.g. a Swedish company claims for damages resulting from an EU-wide cartel against a German cartel member in Germany. Can the court award only EUR or also Swedish Krona?)**

(FR.31) There are no specific provisions if payment is requested in a different currency than the currency of the state where the lawsuit is brought.

**2.5. As damage claims for infringements of EU competition rules often pertain to long-running infringements, please include all applicable interest rates and the date the rate came into force from 1 January 1985 until today. Unless impossible due to national peculiarities, the rates should be listed in a two column table, containing the rate and the date it came into force. This should be accompanied by a legal retrospective that sets out any other changes to the relevant interest regime (e.g. the time interest starts to run, etc.) which occurred over this period, in order to allow a determination of which rules applied at a given point in time between 1 January 1985 and today.**

(FR.32) From 1985 to 2015, no significant change occurred in the interest regime, except that since the 1<sup>st</sup> January 2015, the statutory rate is fixed for one semester and not for the year and a different rate applies according to the type of relationship (B2B, B2C, C2C). See answer to question 2.1.

Table 1 - Interest rates

Year	Rate
<b>1<sup>st</sup> semester 2015</b>	<b>0.93 % or 4.06 %</b>
2014	0.04 %
2013	0.04 %
2012	0.71%
2011	0.38 %
2010	0.65 %
2009	3.79 %
2008	3.99 %
2007	2.95 %
2006	2.11 %
2005	2.05 %
2004	2.27 %
2003	3.29 %
2002	4.26 %
2001	4.26 %
2000	2.74 %
1999	3.47 %
1998	3.36 %
1997	3.87 %
1996	6.65 %
1995	5.82 %
1994	8.40 %
1993	10.40 %
1992	9.69 %
1991	10.26 %
1990	9.36 %
1989	7.82%



<https://www.banque-france.fr/economie-et-statistiques/changes-et-taux/le-taux-de-linteret-legal.html> (Banque de France website)

**2.6. Please identify an official, reliable, publicly available source that publishes the pertinent legal interest rates as they change.**

(FR.33) The pertinent legal interest rates may be consulted on two official websites:

- <http://www.service-public.fr> (French administration website)
- <https://www.banque-france.fr> (French central bank website)

**2.7. If interest rates change on a fixed schedule, please indicate the schedule.**

(FR.34) Interest rates change every semester, in January and in July. See answer to question 2.1.

**2.8. If part of the debt / the damage is being paid, how is interest calculated following that payment? In particular, do partial payments first cover interest or the principal amount? Is there any provision or legal practice similar to Art. 86(3)(2) of the rules of application of Regulation 966/2012 on the financial rules applicable to the general budget of the Union where it is stated that “Any partial payments shall first cover the interest”?**

(FR.35) If part of the debt is being paid, two rules apply.

It follows from Article 1254 of the *Code civil*<sup>448</sup> that partial payments first cover interest and not the principal, except if the creditor agrees otherwise. This provision is similar to Article 86 (3) (2) of Regulation 966/2012.

However, Article 1244-1<sup>449</sup> alinéa 1 of the *Code civil* entitles the court, as regards the debtor and the creditor's financial situations, to postpone or stagger the payment of the debt for at most two years. Alinéa 2 of the same article allows the court to decide that partial payments first cover the principal amount. Article 1244-3 deems unwritten (*repute non-écrite*) any contractual stipulation that would aim to derogate from Article 1244-1 provisions.

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<sup>448</sup> Article 1254:

A debtor of a debt that bears interest or produces revenues cannot, without the obligee-creditor's consent, impute the payment that he makes to the principal in preference to the instalments or interest: a partial payment made on account of the principal and interest is imputed first to the interest.

*“Le débiteur d'une dette qui porte intérêt ou produit des arrérages ne peut point, sans le consentement du créancier, imputer le paiement qu'il fait sur le capital par préférence aux arrérages ou intérêts : le paiement fait sur le capital et intérêts, mais qui n'est point intégral, s'impute d'abord sur les intérêts.”*

<sup>449</sup> Article 1244-1:

al. 1. Nevertheless, account being taken of the situation of the debtor and considering the needs of the creditor, a judge may defer or spread out the payment of sums due over a time limit of no more than two years.

al. 2. By a special and properly grounded judgment, the judge may rule that the sums corresponding to the deferred payments shall carry interest at a reduced rate no less than the statutory rate or that the payments shall be imputed first to the principal.

*“al. 1. Toutefois, compte tenu de la situation du débiteur et en considération des besoins du créancier, le juge peut, dans la limite de deux années, reporter ou échelonner le paiement des sommes dues.”*

al. 2. *Par décision spéciale et motivée, le juge peut prescrire que les sommes correspondant aux échéances reportées porteront intérêt à un taux réduit qui ne peut être inférieur au taux légal ou que les paiements s'imputeront d'abord sur le capital.”*

- 2.9. Please calculate interest in the following hypothetical case. All dates are given in the format dd.mm.yyyy. All amounts are stated without specifying the currency to abstract from implications of the introduction of the common Euro currency. Assume that the claims have not been time barred. Assume that a national court in the Member State on which you are reporting has jurisdiction to rule on the case. Assume that the cartelists are jointly liable for the damage caused by the cartel. If results differ materially depending on whether accrual of interest is based purely on national law or made in compliance with the EU principle of full compensation, provide both calculations.

There was a long running pan-European cartel for a product that materially affected trade between Member States. The cartel lasted from the beginning of 1993 until the dawn raids (unannounced inspections) of the European Commission on 02.02.2009.

On 30.11.2010, a longtime customer of the cartel, who bought the cartelised product in the Member State on which you are reporting, brings a claim for damages against three cartelists (A, B, and C). All of the three defendants have their seat in the Member State on which you are reporting. The customer only bought the cartelised product of the cartelists A and B. In the writ, the claimant specifies the damages caused by the cartel and the date on which the respective damage occurred. The claimant also specifically requests that interest be paid on the damages. The damages (always = 100) and respective dates are set out in Table 2 below. Should a subjective rate be of relevance, you will find the ROI (Return On Investment) rates of the claimant and the three defendants in Table 3 below. You will also find the average interest rate that the claimant had to pay on credit taken out in that year (claimant's average refinance rate).

On 26.11.2013 a court renders a final judgment, ordering the defendant(s) to pay damages and interest. The defendants take until 12.02.2014 to pay. Please specify the total amount the jointly liable defendants have to pay on 12.02.2014 in order to relinquish their debt towards the claimant.

Table 2 - Damage Amounts and Dates

Date the Damage Occurred	Damage Amount
15/11/1993	100
17/09/1996	100
22/02/2006	100
12/08/2008	100

Table 3 - Refinance and Return on Investment Rates

Year	Claimant's Refinance Rate	Claimant's Annual ROI	Defendant's A Annual ROI	Defendant's B Annual ROI	Defendant's C Annual ROI
1993	6.00%	5.50%	4.00%	4.00%	3.00%
1994	6.00%	9.80%	4.00%	4.00%	4.00%
1996	6.00%	1.00%	0.00%	0.00%	0.00%
1997	8.00%	-3.80%	1.00%	1.00%	3.00%
1998	8.00%	1.10%	4.00%	4.00%	5.00%
1999	8.00%	2.80%	1.00%	1.00%	3.00%
2000	8.00%	1.10%	-2.00%	-1.00%	0.00%

*France*

2001	8.00%	4.51%	2.00%	2.00%	3.00%
2002	8.00%	5.30%	4.00%	4.00%	5.00%
2003	8.00%	8.21%	9.00%	9.00%	9.00%
2004	7.00%	9.00%	3.00%	3.00%	2.00%
2005	7.00%	10.00%	1.00%	1.00%	1.00%
2006	7.00%	6.00%	1.00%	1.00%	1.00%
2007	5.00%	-5.00%	4.00%	4.00%	2.00%
2008	5.00%	-7.00%	-1.00%	0.00%	0.00%
2009	5.00%	-5.00%	2.00%	2.00%	4.00%
2010	5.00%	-3.00%	4.00%	4.00%	4.00%
2011	5.00%	-2.70%	4.00%	4.00%	2.00%
2012	5.00%	1.61%	-2.00%	-1.00%	0.00%
2013	5.00%	4.40%	8.00%	8.00%	7.00%
2014	5.00%	1.41%	-4.00%	-3.00%	-1.00%

If not stated otherwise by the corresponding legislation, all calculations should be: i) done with the highest precision possible; ii) based on a determination of the exact part of the month and of the year matured, taking account of leap years. Table 4 below provides an example related to a simplified scenario. It should be noted that Table 4 below shows the capital and the accrued interest rounded to two decimal places (whole cents) only for ease of presentation.

Table 4 - Hypothetical Case (Example)

From	To	Amount	Interest Rate	Total Days	Days in a Year	Interest
01/01/2010	30/06/2010	100.00	10.00%	181	365	4.96
01/07/2010	31/12/2010	100.00	9.00%	184	365	4.54
01/01/2011	30/06/2011	100.00	8.00%	181	365	3.97
01/07/2011	31/12/2011	100.00	7.00%	184	365	3.53
01/01/2012	30/06/2012	100.00	6.00%	183	366	3.00
01/07/2012	31/12/2012	100.00	5.00%	183	366	2.50
						22.49

(FR.36) This hypothetical case will be decided under Article 1153-1 of the Code civil as the obligation is “declared by judgment”.

- I assume that the claimant requests compound interest when he is entitled to ask for it.

3 scenarios are possible:

(FR.37) Scenario 1

The most common scenario: interest starts to accrue the day the judgment is issued (26.11.2013) and ends the day the defendants pay off (12.02.2014).

Relevant data:

- Simple interest: 60 days (from 26.11.2013 to 15.01.2014)
- Aggravated interest: 28 days (16.01.2014 to 12.02.2014)
- No compound interest because the 1 year-delay is not reached

From	To	Amount	Interest Rate	Total Days	Interest	Days in Year
26/11/2013	31/12/2013	400.00	0.04%	36	0.02	365
01/01/2014	14/01/2014	400.00	0.04%	14	0.01	365
15/01/2014	12/02/2014	400.00	5.04%	28	1.55	365
						1.57
						401.57

## (FR.38) Scenario 2

The average scenario: the court decides that interest starts to accrue the day the claim is filed (30.11.2010) and ends the day the defendants pay off (12.02.2014).

Relevant data:

- Simple interest: 1,142 days (from 30.11.2010 to 14.01.2014)
- Aggravated interest: 28 days (15.01.2014 to 12.02.2014)
- Compound interest is allowed if requested after the 1 year-delay is reached
- We assume that the claimant asks for the compound interest to be paid
- Compounding starts to apply exactly 1 year after the date of the claim
- The principal amount for the first compounding is the damage amount plus the simple interest accrued thus far

From	To	Amount	Interest Rate	Total Days	Days in Year	Interest
30/11/2010	31/12/2010	400.00	0.65%	32	365	0.23
01/01/2011	29/11/2011	400.00	0.38%	333	365	1.39
30/11/2011	31/12/2011	401.61	0.38%	32	365	0.13
01/01/2012	29/11/2012	401.75	0.71%	334	366	2.60
30/11/2012	31/12/2012	404.35	0.71%	32	366	0.25
01/01/2013	29/11/2013	404.60	0.04%	333	365	0.15
30/11/2013	31/12/2013	404.75	0.04%	32	365	0.01
01/01/2014	14/01/2014	404.76	0.04%	14	365	0.01
15/01/2014	12/02/2014	404.77	5.04%	28	365	1.53

Total Simple Interest (Compounded)	4.77
Total Aggravated Interest (Compounded)	1.53
Total Interest	6.30
<b>Total Debt</b>	<b>406.30</b>

## (FR.39) Scenario 3

The less common scenario: the court decides that interest starts to accrue the day the cartel started and the first overcharge was paid (15.11.1993) and ends the day the defendants pay off (12.02.2014)

Relevant data:

- Simple interest: 7,366 days (from 15.11.1993 to 14.01.2014)
- Aggravated interest: 28 days (15.01.2014 to 12.02.2014)
- Compound interest is allowed if requested after the 1 year-delay is reached
- Compounding starts to apply exactly 1 year after the date of harm (a judge may also grant compound interest as for the date of the claim is brought in court).

The principal amount for the first compounding is the damage amount plus the simple interest accrued thus far.

*France*

From	To	Amount	Interest Rate	Total Days	Interest	Days in Year
15/11/1993	31/12/1993	100.00	10.40%	47	1.34	365
01/01/1994	14/11/1994	100.00	8.40%	318	7.32	365
15/11/1994	31/12/1994	108.66	8.40%	47	1.13	365
01/01/1995	14/11/1995	109.79	5.82%	318	5.55	365
15/11/1995	31/12/1995	115.34	5.82%	47	0.84	365
01/01/1996	14/11/1996	116.18	6.65%	319	6.71	366
15/11/1996	31/12/1996	122.89	6.65%	47	1.02	366
01/01/1997	14/11/1997	123.91	3.87%	318	4.17	365
15/11/1997	31/12/1997	128.08	3.87%	47	0.63	365
01/01/1998	14/11/1998	128.70	3.36%	318	3.76	365
15/11/1998	31/12/1998	132.46	3.36%	47	0.56	365
01/01/1999	14/11/1999	133.03	3.47%	318	4.01	365
15/11/1999	31/12/1999	137.04	3.47%	47	0.60	365
01/01/2000	14/11/2000	137.64	2.74%	319	3.28	366
15/11/2000	31/12/2000	140.93	2.74%	47	0.49	366
01/01/2001	14/11/2001	141.42	4.26%	318	5.23	365
15/11/2001	31/12/2001	146.65	4.26%	47	0.79	365
01/01/2002	14/11/2002	147.44	4.26%	318	5.46	365
15/11/2002	31/12/2002	152.90	4.26%	47	0.82	365
01/01/2003	14/11/2003	153.72	3.29%	318	4.40	365
15/11/2003	31/12/2003	158.12	3.29%	47	0.66	365
01/01/2004	14/11/2004	158.78	2.27%	319	3.14	366
15/11/2004	31/12/2004	161.91	2.27%	47	0.47	366
01/01/2005	14/11/2005	162.38	2.05%	318	2.90	365
15/11/2005	31/12/2005	165.28	2.05%	47	0.43	365
01/01/2006	14/11/2006	165.71	2.11%	318	3.04	365
15/11/2006	31/12/2006	168.75	2.11%	47	0.45	365
01/01/2007	14/11/2007	169.21	2.95%	318	4.34	365
15/11/2007	31/12/2007	173.55	2.95%	47	0.65	365
01/01/2008	14/11/2008	174.20	3.99%	319	6.04	366
15/11/2008	31/12/2008	180.24	3.99%	47	0.91	366
01/01/2009	14/11/2009	181.15	3.79%	318	5.97	365
15/11/2009	31/12/2009	187.12	3.79%	47	0.90	365
01/01/2010	14/11/2010	188.01	0.65%	318	1.06	365
15/11/2010	31/12/2010	189.08	0.65%	47	0.16	365
01/01/2011	14/11/2011	189.24	0.38%	318	0.63	365
15/11/2011	31/12/2011	189.86	0.38%	47	0.09	365
01/01/2012	14/11/2012	189.96	0.71%	319	1.17	366
15/11/2012	31/12/2012	191.13	0.71%	47	0.17	366
01/01/2013	14/11/2013	191.30	0.04%	318	0.07	365
15/11/2013	31/12/2013	191.37	0.04%	47	0.01	365
01/01/2014	01/11/2014	191.38	0.04%	14	0.00	365
15/01/2014	12/02/2014	191.38	5.04%	28	0.72	365

Total Simple Interest (Compounded)	91.38
Total Aggravated Interest (Compounded)	0.72
Total Interest	92.11
<b>Total Debt</b>	<b>192.11</b>

From	To	Amount	Interest Rate	Total Days	Interest	Days in Year
17/09/1996	31/12/1996	100.00	6.65%	106	1.93	366

Total Simple Interest (Compounded)	57.38
Total Aggravated Interest (Compounded)	0.59
Total Interest	57.97
<b>Total Debt</b>	<b>157.97</b>

From	To	Amount	Interest Rate	Total Days	Interest	Days in Year
22/02/2006	31/12/2006	100.00	2.11%	313	1.81	365
01/01/2007	21/02/2007	100.00	2.95%	52	0.42	365
22/02/2007	31/12/2007	102.23	2.95%	313	2.58	365
01/01/2008	21/02/2008	104.81	3.99%	52	0.58	366
22/02/2008	31/12/2008	105.39	3.99%	314	3.60	366
01/01/2009	21/02/2009	108.99	3.79%	52	0.58	365
22/02/2009	31/12/2009	109.57	3.79%	313	3.55	365
01/01/2010	21/02/2010	113.12	0.65%	52	0.10	365
22/02/2010	31/12/2010	113.23	0.65%	313	0.63	365
01/01/2011	21/02/2011	113.86	0.38%	52	0.06	365
22/02/2011	31/12/2011	113.92	0.38%	313	0.37	365
01/01/2012	21/02/2012	114.29	0.71%	52	0.11	366
22/02/2012	31/12/2012	114.41	0.71%	314	0.70	366
01/01/2013	21/02/2013	115.10	0.04%	52	0.01	365
22/02/2013	31/12/2013	115.11	0.04%	313	0.04	365
01/01/2014	14/01/2014	115.15	0.04%	14	0.00	365
15/01/2014	12/02/2014	115.15	5.04%	28	0.44	365

Total Simple Interest (Compounded)	15.15
Total Aggravated Interest (Compounded)	0.44
Total Interest	15.59
<b>Total Debt</b>	<b>115.59</b>

From	To	Amount	Interest Rate	Total Days	Interest	Days in Year
12/08/2008	31/12/2008	100.00	3.99%	142	1.55	366
01/01/2009	11/08/2009	100.00	3.79%	223	2.32	365
12/08/2009	31/12/2009	103.86	3.79%	142	1.51	365
01/01/2010	11/08/2010	105.38	0.65%	223	0.42	365
12/08/2010	31/12/2010	105.80	0.65%	142	0.27	365
01/01/2011	11/08/2011	106.06	0.38%	223	0.25	365
12/08/2011	31/12/2011	106.31	0.38%	142	0.16	365
01/01/2012	11/08/2012	106.47	0.71%	224	0.46	366
12/08/2012	31/12/2012	106.93	0.71%	142	0.29	366
01/01/2013	11/08/2013	107.22	0.04%	223	0.03	365
12/08/2013	31/12/2013	107.25	0.04%	142	0.02	365
01/01/2014	14/01/2014	107.26	0.04%	14	0.00	365
15/01/2014	12/02/2014	107.27	5.04%	28	0.41	365

Total Simple Interest (Compounded)	7.27
Total Aggravated Interest (Compounded)	0.41
Total Interest	7.67
<b>Total Debt</b>	<b>107.67</b>

<b>Final Total Debt</b>	<b>573.33</b>
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### Section III. Procedural Aspects

- 3.1. What are the procedures for the party seeking to receive interest on the damages paid? (e.g. does the claimant have to make a separate plea for the interest payments and if so, what information and evidence must be supplied? Does the judge award interest ex officio or does the claimant have to request it?)**

(FR.40) Simple and aggravated interests

**Simple and aggravated interests payment is automatic (*de plein droit*):** no specific procedure is to be followed and no specific plea is required from the claimant. **It means that there are no substantive requirements for a claimant to get interest other than the effluxion of time.** For instance, even if the judgment on the merits does not contain any specific provision regarding the interest payment, the succumbent shall pay this interest. See however answer to question 1.2.

The *Cour de cassation* decided in 1998 that even if no substantive requirement needed to be fulfilled for the right to be acknowledged, **when the party ordered to pay does not pay on its own motion, usual procedural requirements to obtain the forced execution of the**



**judgment still apply provided that the creditor holds a legal title (*un titre*)<sup>450</sup>.** Two foreseeable situations can occur:

- If the judgment on the merits includes specific provisions regarding interest, the creditor has a legal title to claim the payment of interest. The enforcement procedure, ~~brought to the specific formation of the court~~ (*juge de l'exécution*), was simple and it was thus quicker to break down any resistance from the debtor's part to pay off interest.
- If the judgment on the merits did not include specific provisions regarding interest, the creditor did not have a legal title to claim the payment of interest. It meant that he had to file a new claim in order to assert his right, get the required legal title and then seek for legal enforcement if the debtor keeps resisting.

- (FR.41) The most recent case law departs from this solution. The *Cour de cassation* decides henceforth that even if the judgment on the merits does not include any specific provision on the interest payment, the creditor has a legal title to ask for the forced execution to the courts specialised in enforcement matters (*juge de l'exécution*) without further procedural requirements<sup>451</sup>.
- (FR.42) Nonetheless, in order to avoid the risk related to the former case-law revival, it is wiser for the claimant to make a plea (separate or not) to be sure that the court will include in its final judgment specific provisions related to interest payment. This provision will thus offer the claimant a legal title, required by the *Cour de cassation* in its former ruling to get the forced execution.

(FR.43) Compound interest

**Unlike simple and aggravated interest, compound interest can only be paid to the claimant if he requests it.** The court cannot refuse the capitalisation of interest, provided that the statutory conditions are met<sup>452</sup>. Article 1154 of the *Code civil* is a public policy provision<sup>453</sup> and applies to tortious obligations<sup>454</sup>. The main condition set out by this article is that capitalisation may only cover the interest due "at least for a whole year." But the request can be made before, as far as it concerns the interest due for that first year period<sup>455</sup>.

### 3.2. Can the judge award a higher interest amount than requested by the claimant or does the principle of *ne ultra petita* apply?

(FR.44) Under Article 1153-1 of the *Code civil*, courts can award a higher interest amount only by deciding to bring forward the day interest starts to accrue (e. g. to the day the claim is filed or the day the loss has been suffered). Courts may do so *ex officio*, without being barred by the *ne ultra petita* principle. See answer to question 1.2.

<sup>450</sup> Cass. civ. 1<sup>ère</sup>, 10 mars 1998, no 95-21.817, *Bull. civ. I*, no 100; *RCA* 1998, no 189; *RTD civ.* 1999, 206, obs. R. Perrot

<sup>451</sup> Cass. civ. 2<sup>e</sup>, 23 sept. 2004, no 02-20.943; *D.*, 2004, p. 2694; Cass. civ. 2<sup>e</sup>, 30 avr. 2003, no 01-14.968; Cass. civ. 2<sup>e</sup>, 17 juin 1999, *Bull. civ. II*, no 121 ; *D.* 1999, IR p. 222; *RTD civ.* 1999, p. 706, no 9, obs. R. Perrot.

<sup>452</sup> Cass. civ. 1<sup>ère</sup>, 16 avr. 1996, no 94-13.803, *Bull. civ. I*, no 180; *Gaz. Pal.* 1997, 1. Somm. 202, obs. Croze et Morel; *Defrénois* 1996, 1443, obs. Champenois; *RTD civ.* 1996, 584, obs. J. Hauser ; Cass. civ. 1<sup>ère</sup>, 6 juin 2001, no 99-11.528; *Bull. civ.* 2001, I, no 157 ; *JCP G* 2001, IV, 2442; Cass. civ. 1<sup>ère</sup>, 6 oct. 2011, no 10-23.742, *Bull. civ. I*, no 156 ; *Resp. civ. et assur.* 2012, comm. 5; Cass. civ. 1<sup>ère</sup>, 6 nov. 2013, no 12-16.625; *JurisData* no 2013-024775

<sup>453</sup> Cass. civ., 21 juin 1920; *DP* 1924, 1, p. 102; Cass. civ. 1<sup>ère</sup>, 1er juin 1960, *Bull. civ. I*, no 305

<sup>454</sup> Cass. civ. 3<sup>e</sup>, 4 déc. 1991; *JCP G* 1992, IV, 475

<sup>455</sup> Cass. civ. 3<sup>e</sup>, 26 févr. 1974, *Bull. civ. III*, no 91; Cass. civ. 1<sup>ère</sup>, 12 mars 1991, *Bull. civ. I*, no 89; *JCP G* 1991, IV, 184; Cass. civ. 3<sup>e</sup>, 18 févr. 1998, *Bull. civ. III*, no 42; *JCP G* 1998, IV, 1781; Cass. civ. 2<sup>e</sup>, 1<sup>er</sup> juin 2011, no 10-18.829.

**3.3. Can the judge estimate interest or does interest always have to be calculated?**

(FR.45) Interest has to be calculated. See answer to question 1.2. for aggravated damages.

**3.4. If the claimant changes the request regarding the interest, is this regarded as an amendment of the pleadings? Is this only possible until a certain stage into the proceedings and precluded later on or can the claimant make such changes without negative procedural consequences at any time up to the judgment?**

(FR.46) The claimant may change his request at any time in his submissions (*conclusions*) up to the closure of the pre-trial examination procedure (*clôture de l'instruction*), pursuant **Article 783 of the Code de procédure civile**. Usually in competition litigation this closure is pronounced by an order of the pre-trial judge (*ordonnance de clôture du juge de la mise en état*). More precisely, it follows from Article 753 of the *Code de procédure civile* that the court only decides on the merits of a case as regards the last *conclusions* submitted by the litigants (*conclusions récapitulatives*). Therefore, **the claimant up to these conclusions récapitulatives could change the request regarding interest.**

**Section IV. Specific Instances**

**4.1. Identify any cases relating to damages claims for infringements of competition law and explain how interest was calculated. In writing these summaries, provide all relevant information about how interest and other compensation for the effluxion of time was calculated.**

(FR.47) French courts have issued few significant cases relating to damages claims for infringements of competition law. Moreover, none of the cases reported hereunder addressed the question of interest. The reason is that interest is considered as a matter of enforcement tackled by the *juge de l'exécution* and not by the *juge du fond* that decides on the merits (*see my preliminary observations*).

I included in the cases described hereunder abuse of dominant position cases because the method to calculate interest and damages is identical to the one courts will apply for cartel cases.

- i) **CA Paris, ch. 5-4, 27 mai 2015, R. G. no 14/14758, Sté Lectiel (en liquidation) c/ SA Orange (anciennement SA France Telecom)**

**Facts:** in this long-standing litigation (it has lasted nearly 24 years and is not over yet...), a competitor of France Telecom (Lectiel) specializing in telemarketing operations complained that the access to a list of France Telecom's subscribers was offered at an excessive price by its owner. The former *Conseil de la concurrence* condemned France Telecom for abuse of dominant position and the plaintiff tried to seek for compensation.

**Judgment:** the *Cour d'appel de Paris* decides that France Telecom is at fault and the claimant shall be awarded damages.

**Relevant point:** The court appoints an expert to quantify the loss suffered by the claimant so the judgment does not provide useful information on calculation of damages and interest. But it is noteworthy that in its submission, the claimant asserts that the interest started to accrue the day the loss have been suffered. As the first abuse of France Telecom

occurred in the mid-1980's, the claimants supports that interest represents more than 50% of the loss (2,8 billion for the loss + 1,9 billion for the interest, according to the claimant's most "optimistic" quantification).

- ii) **CA Paris, ch. 5-5, 27 févr. 2014, SNC Doux Aliments Bretagne et al. c/ Sté Ajinomoto Eurolysine, R. G. n° 10/18285 ; Contrats conc. consom., 2014/6, comm. 139, note G. Decocq** (after Cass. com., 15 juin 2010, n° 09-15816, non publié ; *D.*, 2010, p. 2781, note Y. Utzschneider, H. Parmentier ; *Contrats conc. consom.*, 2010, n° 232, obs. Malaurie-Vignal ; *Gaz. Pal.*, 12 févr. 2011, n° 43, p. 43, obs. J. Philippe, M. Trabucchi ; *RJDA* 2011, n° 349 ; *Concurrences*, 2010, n° 4, p. 205, obs. Lemaire et Cousin).

**Facts:** Several victims (the companies of the group Doux) of the Lysine cartel brought a follow-on action against one of the convicted cartelists (Ajinomoto) to seek compensation for the loss caused by the overcharges they had to pay. This litigation raised major legal issues related to the passing-on defense. The *Cour de cassation* allowed this defense by its 2010 judgment. The 2014 judgment of the *Cour d'appel de Paris* decides on the merits of the case (*arrêt de renvoi*).

**Judgment:** the courts finds that it was impossible for the victims to pass-on the overcharges for different reasons, not relevant here. It awards the victims 1,23 million euros.

**Relevant point:** the court in the judgment makes a very interesting and unusual point. Interest is not addressed under the usual Article 1153-1-rule but the court decides to grant damages for **the loss caused by the fact that a part of the claimants' cash flows was not at their disposal as it covered the overcharge**. Interest is not mentioned but in my opinion the court should have applied the Article 1153-1-rule. It seems however that the sums awarded in this case are higher than those the victims could have been awarded on the ground of Article 1153-1.

The court states that:

« The companies Doux (the claimants) had to mobilize their cash flows to cover these overcharges and thereby suffered a loss to the extent thereof the without any need to seek the impact of this loss on their profits; they shall receive as a compensation of this loss the following sums (...) <sup>456</sup> »

By this ruling, the court overcomes the limits of the statutory lump-sum compensation. It does so by deciding that the loss of cash flows is an additional loss, added to the overcharge considered as a *damnum emergens*. It is impossible to know whether the court clearly intends to set aside the provisions on statutory interest or not as no explicit reference is made to Article 1153-1. It is remarkable too that the court awards these specific damages *ex officio* and does not explain how these damages are quantified.

<sup>456</sup> “les sociétés Doux ont ainsi dû mobiliser leur trésorerie pour faire face à ces surcoûts et ont ainsi subi de ce fait un préjudice particulier à la mesure de ceux-ci et de l'ancienneté des dépenses effectuées, sans qu'il y ait lieu de rechercher un impact en résultant sur leur bénéfice ; qu'il y a lieu de les indemniser de ce préjudice en leur allouant à ce titre les sommes suivantes (...)”

I summarised in the table below the damages awarded to the victims:

Name of the victim	Damages awarded for the loss caused by the overcharge (in €)	Damages awarded for the loss of cash flows (in €)
Doux Aliments Bretagne SARL	590,538	118,000
Doux Aliments Vendée SNC	347,667	68,000
Doux Aliments Cornouailles SNC	139,126	26,000
Doux Aliments Bretagne SNC	187,016	136,000

The damages awarded for the loss of cash flows represent 15-20% of the damages awarded for the loss caused by the overcharge, except for the fourth company: Doux Aliments Bretagne SNC (72.8%). This ratio is not outstanding but it is still higher than what the court would have probably awarded under Article 1153-1 of the *Code civil*. It is also quite unpredictable as the judge quantify damages by using its margin of appreciation.

**4.2. Are the rules on the award of interest specific to the kinds of claim or general principles? Are there any specific approaches/rules that you can identify in national or EU competition cases, or in other cases where the claim is brought by business against business (B2B) and are there any specific approaches/rules in business versus consumer (B2C) cases?**

(FR.48) Interest payment in competition litigation is governed by the general principles laid down in the *Code civil* and in the *Code monétaire et financier*. Since January 2015, the statutory rate differs in B2B and B2C litigation. See answer to question 2.1.

**Section V. Evaluation, Interpretation in conformity with EU Law, and Intertemporal Aspect**

**5.1. Throughout the reports, evaluate how satisfactory are the rules on the calculation of interest perceived to be? In considering this question, identify any law reform proposals in the last 15 years or so, or any major judgments by the higher courts that call into question or change some of the issues pertaining to the award of damages. Please identify changes of relevant national law on interest that will come into force or are currently considered.**

(FR.49) So far, and as stated above, very few scholars have attempted to answer the question of how interest is calculated under French law. But those who did so endorsed the view that French rules do not obey to a consistent scheme<sup>457</sup>. In particular, **it has been asserted that the lump sum compensation is at odd with the full compensation principle.** See answer to question 1.4.

(FR.50) The fact that in many cases interest starts to accrue the day the judgment is issued when grounded on Article 1153-1 of the *Code civil*, whereas it starts to accrue the day of the demand to pay under Article 1153 alinéa 3 (e. g. the day the action is brought to justice), has also been perceived as unsatisfactory. **In order to align the Article 1153-1-rule with the one of Article**

<sup>457</sup> F. Gréau, *op. cit.*, *passim*; L. Raschel, *op. cit.*, *passim*.

**1153 alinéa 3, some scholars have been suggesting to fix the starting point of the accrual of interest to the day the action is brought to court<sup>458</sup>.**

(FR.51) Notwithstanding this criticism, no significant reforms have occurred in the past 15 years, (with the exception of the new rules on calculation introduced by the *Ordonnance* No. 2014-947 of 20th August 2014, *see answer to question 2.1*).

**5.2. For each question, where it is relevant, assess the compliance of the national interest rules with the minimum standard prescribed by EU law ('full compensation'). If national law does not grant full compensation, please try to identify an interpretation of national law that guarantees full compensation in conformity with European law.**

**Regarding the secondary subject of investigation (interest on damages due to infringements of national competition law only) Recital 12 of the preamble of Directive 2014/104/EU summarises the EU law principles regarding interest as follows:**

**"Anyone who has suffered harm caused by an infringement can claim compensation for the actual loss (*damnum emergens*), for the gain of which he has been deprived (loss of profit or *lucrum cessans*) plus interest. This is irrespective of whether the national rules define these categories separately or in combination. The payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time, and it should be due from the time the harm occurred until compensation is paid, without prejudice to the qualification of such interest as compensatory or default interest under national law. This is also without prejudice to whether effluxion of time is taken into account as a separate category (interest) or as a constituent part of actual loss of profit. It is incumbent on the Member States to lay down the rules to be applied for that purpose"**

**Would the right to full compensation as set out by Recital 12 of the proposed directive apply to interest calculation for damages in cases where only national competition law has been infringed and the damage occurred before the implementation of the directive came into force?**

(FR.52) The principle of full compensation is well established in French law since a 1954 landmark decision of the *Cour de cassation*<sup>459</sup>. There is no doubt that national courts have to apply it to past infringements of EU law.

(FR.53) **But my personal opinion is that Article 1153-1 of the *Code civil* applicable to cartel damage claims comply neither with the full compensation principle recognised by the *Cour de cassation* nor with the minimum standard prescribed by EU law. I agree with the criticism mentioned above. *See answer to question 1.4.***

(FR.54) **An innovative interpretation of this article could be to grant the claimants higher damages than the lump-sum they are entitled to receive under the current state of play, which could be based on an analogic rationale inspired by Article L. 441-6, I, alinéa 8 of the *Code de commerce* and on the legally binding principle of primacy of EU law that underlies the full compensation objective of EU case-law. *See below.***

<sup>458</sup> For an overview of this suggestion, see G. Viney, P. Jourdain, *op. cit.*, no 347.

<sup>459</sup> Cass. civ. 2<sup>e</sup>, 28 oct. 1954, *JCP G*, II, 8765, note R. Savatier: « *Le propre de la responsabilité civile est de rétablir aussi exactement que possible l'équilibre détruit par le dommage et de replacer la victime, aux dépens du responsable dans la situation où elle se serait trouvée si l'acte dommageable n'avait pas eu lieu.* »

(FR.55) **It could be also possible to claim that the loss of cash flows shall be compensated as an additional loss, relying on the *Doux* precedent. See answer to question 4.2.**

(FR.56) To support this proposal, I would undertake an unnoticed reform introduced in the French branch of competition law designed to regulate the conflictual relationships in the distribution sector: the *droit des pratiques restrictives de concurrence*. This branch of competition law, ruled by Title IV of Book IV of the *Code de commerce* (Article L. 440-1 seq.), must be distinguished from the more famous *droit des pratiques anticoncurrentielles* of Title II of Book IV of the *Code de commerce* (Article L. 420-1 seq.), the French counter-part of Article 101 and 102 TFEU. Scholars usually overlook the *droit des pratiques restrictives de concurrence*, as it is regarded as an extremely bureaucratic and unpredictable legislation. That being said, some of its innovations are transposed to the *Code civil* by the French legislator. As such, these innovations could be seen as an indication of forthcoming evolutions of contract and tort law general rules and should draw the attention.

Yet, by the Act no 2012-1270 of 20th novembre 2012 (known by the name of « *Loi Lurel* »), a new sentence was added to Article L. 441-6, I, alinéa 8 of the *Code de commerce* (see question 1.2). This Article now provides that:

“When the recovery costs exposed are higher than the amount of this fixed charge, the creditor may ask for additional compensation, on production of evidence.”

To my knowledge, French courts have not applied this provision yet.

**Article L. 441-6, I, alinéa 8 clearly allows the creditor of a contractual obligation in B2B relationships to request an additional compensation for the real loss caused by the debtor’s delay to pay off a sum of money. This additional compensation is designed to complete the lump sum granted by the statutory rate of interest.** In other words, French courts are not bound anymore by the statutory rate when compensating that sort of loss in B2B contractual relationships. They recover their usual margin of appreciation to estimate damages. It is therefore an exception to Article 1153 of the *Code civil*.

Article L. 441-6, I, alinéa 8 of the *Code de commerce* does not apply to cartel damage claims, as such claims are ruled by Article 1153-1 of the *Code civil*. But my opinion is that the innovative provisions of the *Code de commerce* could pave the way to an evolution of the interpretation of Article 1153-1 of the *Code civil*. **This solution seems to me to be the only one to be adopted if French courts want their case law to be consistent with the full compensation principle. It could therefore serve as a milestone provision to defend the idea that the application of Article 1153-1 should not prevent the courts from compensating the additional loss in excess of the loss compensated by the statutory rate interest.**

**This argument could also be based on the principle of primacy of EU law over national law. In this respect, the historically low statutory rates that apply for the past decades could be regarded as being in non-compliance with the full compensation principle of EU law.**

(FR.57) I would not be able to assess the chances of such views being adopted into French law. As I said, very few academic studies questioned the French rules on interest and to my knowledge, no tangible signs foreshadow major changes coming from the judge or the legislator. But in the past few years, it has no longer been unusual to see the French *Cour de cassation* set aside or interpret ‘in conformity’ French legal provisions that contradict European provisions, to guarantee the primacy of such provisions, whether it is EU or ECHR law. The *Cour de*

*cassation* is now a leading actor in the evolution of French law and could push forward the cartel damage claims state of play.

### ***Glossary and abbreviations***

<b>Name in French</b>	<b>Translation into English</b>	<b>Abbreviation used in the footnotes or in the text</b>
Assemblée plénière	The highest formation of the Cour de cassation	“Ass. plén.”
Autorité de la concurrence	French competition authority	“Aut. conc.”
Code civil	Civil Code	“C. civ.”
Code de commerce	Commercial Code	“C. com.”
Code de la consommation	Consumer Code	“C. consom.”
Code de procédure civile	Code of Civil Procedure	“C. pr. civ.”
Conseil constitutionnel	French Constitutionnal court	“Cons. const.”
Conseil de la concurrence	Former French competition authority, replaced in 2009 by the Autorité de la concurrence	“Cons. conc.”
Cour d’appel	Court of Appeal	“CA” followed by the indication of the city, e. g. CA Paris and of its chamber when known e. g. “ch. 5-4” for section 4 of the pole 5 or “ch. civ.” for the “civil chamber”)
Cour de cassation	French Supreme Court for civil, commercial and criminal matters	“Cass.”, followed by the abbreviation of the Court’s chamber, e. g. “com.” for “commercial chamber”, “civ. 1” for “1 <sup>st</sup> civil chamber”
Loi	Act	“Loi” followed by the name of the minister who presented the act
Tribunal de commerce	Commercial court of first instance	“T. com.” followed by the indication of the city
Tribunal de grande instance	Civil court of first instance	“TGI” followed by the indication of the city

## Germany

Maria José Schmidt-Kessen\*

### *Preliminary Matters*

- (DE.1) Private antitrust damages claims in Germany can be divided into stand-alone and follow-on actions, and brought since the 7th law reform of German antitrust law (7. GWB Novelle) in 2005 under §33(3) of the Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen - GWB). This provision makes no distinction between breaches of national and EU antitrust rules in damages claims. As the case-law analysis below will show, most damage claims involving interest payments are stand-alone claims and concern unilateral behaviour. They are brought under Art. 102 TFEU and/or §§19-20 GWB. For cases predating the 7th law reform, interest for antitrust damages can be claimed under the general provisions of the German Civil Code (Bürgerliches Gesetzbuch - BGB), in particular under §849 BGB in conjunction with §246 BGB. The general principles of equivalence and effectiveness of EU law<sup>460</sup> could be interpreted as requiring the application of §849 BGB in conjunction with §246 BGB also for interest on damages for breaches of EU competition law.
- (DE.2) In relation to interest payments for antitrust damages claims, it should be noted that German law contains a specific provision in §33(3) fourth sentence GWB, which obliges courts to award interest payments on antitrust damages since the moment the harm occurred. This provision was introduced in the GWB in 2005 and does not apply to older cases. Nonetheless, for claims predating the entry into force of §33(3) fourth and fifth sentence GWB, interest is still payable since the moment the damage occurred (on the basis of §849 BGB in conjunction with §246 BGB).<sup>461</sup>
- (DE.3) So far, most German courts have addressed the issue of interest payments for antitrust damages claims only in a superficial manner. Albeit the holding (*'Tenor'*) of the judgments often includes the grant of interest payment equal to 5.00% above the basic rate of interest for the successful claimant, courts rarely engage in calculus to state the exact sum in Euro of interest payment which is awarded. The courts usually also omit to state the reasons for setting a specific date from which interest starts to accrue. Despite the fact that the statutory rules are very clear, this suggests that the exact amount of interest payments might be rather unpredictable in practice.

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<sup>460</sup> The EU law principles of equivalence and effectiveness intend to ensure that national law grants remedies for breaches of rights under EU law. This was first established in CJEU, Case 33/76, *Rewe* (principle of equivalence) and Case C-261/95, *Palmisani* (principle of effectiveness). In the area of EU competition law, the application of these principles was affirmed e.g. in Case C-453/99, *Courage Ltd v Bernard Crehan* (para. 26) and Case C-360/09, *Pfleiderer AG v BKartA* (para. 24).

<sup>461</sup> OLG Karlsruhe, judgment of 27 August 2014 - 6 U 116/11 (Kart) -, juris (Tz. 156-165).



## Section I. General Principles

### 1.1. What is interest? Is there a definition?

- (DE.4) There is no statutory definition of interest as such. The civil law meaning of interest (*‘Zinsen im Sinne des Bürgerlichen Rechts’*) has been defined in the case-law of the Federal Supreme Court (*Bundesgerichtshof* - BGH) as term-dependent monetary compensation for the use of capital, which is independent of profit or turnover.<sup>462</sup>

### 1.2. When, and under what conditions, is interest payable at all? Does this depend on whether the claim is brought in tort, breach of contract or (where applicable) restitution\unjust enrichment?

- (DE.5) Since the 7<sup>th</sup> law reform of German antitrust law in 2005, the GWB contains a specific provision, which applies to interest payments for antitrust damages. According to §33(3) fourth and fifth sentence GWB, undertakings are liable to pay interest for pecuniary damages (*‘Geldschuld’*) from the moment in which the antitrust damage occurred. The interest rate is determined according to §288 and §289 first sentence BGB, which apply *mutatis mutandis*.
- (DE.6) §288 BGB is the provision in the BGB applicable to interest payments in case of the delayed payment of monetary obligations (antitrust damages belong in this category of monetary obligation or *Geldschuld*). Monetary obligations can arise in any field of the law of obligations, i.e. interest is payable independent from whether the claim is brought in tort, contract or unjust enrichment.<sup>463</sup> Nonetheless, the type of the claim is relevant to determine which interest rate of §288 BGB applies, i.e. whether the standard rate of 5.00% above the basic rate of interest applies or the special rate of 9.00% above the basic rate of interest applies. The special rate of interest only applies to payment claims in commercial transactions (*‘Entgeltforderungen’*).<sup>464</sup> For antitrust damages claimed under §33(3) fourth and fifth sentence GWB, the condition of §288 BGB that there be a delay (*‘Verzug’*) in order to trigger interest claims is not applicable; as a rule interest is payable since the moment the damage occurred.<sup>465</sup>
- (DE.7) §289 first sentence BGB contains the prohibition of compound interest. Even though interest payments constitute monetary obligations in themselves, they are excluded from giving rise to additional interest claims for delayed interest payments.<sup>466</sup> This provision would preclude the application of compound interest payments for antitrust damages.

<sup>462</sup> “[E]ine gewinnunabhängige und umsatzunabhängige, aber laufzeitabhängige, in Geld zu entrichtende Vergütung für den Kapitalgebrauch” (translation: “[A] term-dependent monetary compensation for the use of capital, which is independent of profit or turnover”) (BGH, NJW 1979, 805-807 (Rn. 26)). Cf. also BGH, NJW 1979, 2089-2091 (Rn. 16, 21) and MünchKomm-BGB/Ernst, 6. Aufl., §289 Rn. 3.

<sup>463</sup> MünchKomm-BGB/Ernst, 6. Aufl., §288 Rn. 12-13, 15.

<sup>464</sup> For further details on standard and special rate of interest, cf. Question 2.1. Cf. also judgment OLG Celle, Urteil vom 17. Juni 2010 - 13 U 5/10 (Kart) -, juris, summarized under Question 4.1, in which the Higher Regional Court of Celle only awarded interest of 5.00% above basic rate of interest, because damage was claimed under the heading of unjust enrichment (Rn.41) and was not an *‘Entgeltforderung’* (payment claim) in the sense of §288(2) BGB, which would have given rise to the special rate of interest (until 2014 the special rate of interest was at 8.00% above the basic rate of interest).

<sup>465</sup> BGH, judgment of 6 November 2013, *VBL Gegenwert*, KZR 58/11, Tz. 72, WuW/E DE-R 4037-4049.

<sup>466</sup> MünchKomm-BGB/Ernst, 6. Aufl., §288 Rn. 12.

- (DE.8) For antitrust damage that occurred before 1 July 2005, i.e. before the 7<sup>th</sup> antitrust law reform entered into force, interest also starts to accrue from the moment the harm occurred, but it does so on the basis of §849 BGB in conjunction with §246 BGB.<sup>467</sup> According to §246 BGB, the amount of interest to be paid is however fixed at 4.00% per year, it is thus lower than under §288(1) BGB, which provides for a standard interest payment of 5.00% above the basic rate of interest per year. §246 BGB provides for a standard rule of 4.00% of yearly interest, which is supported by the dominant opinion in literature and is applied by most courts.<sup>468</sup> There is however also a minority opinion which supports an application of §849 BGB in conjunction with §288(1) BGB, which would yield an interest rate of 5.00% above the basic rate of interest since the moment the damage occurred.<sup>469</sup> This interpretation of §849 BGB could potentially also be extended to the special interest rate of 9.00% above the basic rate of interest under §288(2) BGB.
- (DE.9) For interest claims under restitution/unjust enrichment, §288 BGB is applicable, since it applies to any type of monetary obligation. Monetary obligations can arise in any field of the law of obligations, i.e. interest is payable independent from whether the claim is brought in tort, contract or unjust enrichment and are payable from the moment the debtor is notified about it (through a ‘*Mahnung*’ or equivalent).<sup>470</sup> The interest rate applicable in the period of 1 January 1985 until 30 April 2000 was determined by the old version of §288 BGB which provided for an annual interest rate of 4.00%.<sup>471</sup> Subsequently, there was an *interim* version of §288 BGB which was in force from 1 May 2000 until 31 December 2001, which referred to an interest payment of the amount of 5.00% above the basic rate of interest as determined according to §1 Discount Rate Transition Act (*Diskontsatz-Überleitungs-Gesetz – DÜG*). From 1 January 2002 §288 BGB entered into force in its current form, referring to the basic rate of interest as determined according to §247 BGB (for further details, cf. Question 2.1).

### 1.3. Is payment of interest compulsory or at the discretion of the court?

- (DE.10) According to the statutory wording of §33(3) fourth and fifth sentence GWB, interest payment is compulsory if the conditions of the provision are met (*‘Verzinsungspflicht’*)<sup>472</sup>, i.e. when antitrust damages in form of monetary obligations have been established by the court. This means that the payment of interest is compulsory from the moment in which the damage occurred if the claim is brought under §33(3) GWB and the court actually awards damages.
- (DE.11) For cases predating the 7th law reform, interest for antitrust damages can be claimed under the general provisions of the BGB under §849 BGB in conjunction with §246 BGB since the moment the damage occurred.<sup>473</sup> Payment of interest can be considered compulsory at the

<sup>467</sup> OLG Karlsruhe, judgment of 27 August 2014 - 6 U 116/11 (Kart) -, juris (Tz. 156-165).

<sup>468</sup> OLG Karlsruhe, judgment of 27 August 2014 - 6 U 116/11 (Kart) -, juris (Tz. 163) by reference to BGH, NJW 2008, 1084 Rn. 3; Sprau in Palandt, BGB, 73. Aufl. §1; Rüßmann in juri sPK-BGB, §849 BGB Rn. 4, and Bueren, WuW 2012, 1060.

<sup>469</sup> OLG Karlsruhe, judgment of 27 August 2014 - 6 U 116/11 (Kart) -, juris (Tz. 163) by reference to Wagner in Münchener Kommentar zum BGB, 6. Aufl., §849 BGB Rn. 6.

<sup>470</sup> MünchKomm-BGB/Ernst, 6. Aufl., §288 Rn. 12-13, 15.

<sup>471</sup> OLG Düsseldorf, Urteil vom 08. Juni 2011 VI-U (Kart) 2/11, U (Kart) 2/11, juris, Tz. 397. Wording of §288(1) until 30 April 2000: “Eine Geldschuld ist während des Verzugs mit vier vom Hundert für das Jahr zu verzinsen. Kann der Gläubiger aus einem anderen Rechtsgrunde höhere Zinsen verlangen, so sind diese fortzuentrichten” (translation: “During delay, money debt is to be charged with an interest of four of the hundred per year. If the creditor can request higher interest on another legal basis, these are to be paid”).

<sup>472</sup> Langen/Bunte, 12. Aufl., §33 Rn. 159.

<sup>473</sup> OLG Karlsruhe, judgment of 27 August 2014 - 6 U 116/11 (Kart) -, juris (Tz. 156-165).

statutorily provided rate in §246 BGB according to the dominant opinion in case-law and literature. A minority opinion considers interest payment to be compulsory according to the rate set in §288(1) BGB of 5.00% above the basic rate of interest.<sup>474</sup>

**1.4. What is said to be the purpose of the interest payment?**

- (DE.12) According to legislative history of the 7<sup>th</sup> antitrust reform, the purpose of interest payment in antitrust damages actions is threefold. The first purpose is based on the assumption that a claimant will often bring a damage claim as a follow-on claim to a finding of infringement by a competition authority. Consequently, the payment of interest is meant to avoid that the real value of damages diminishes due to time gap between the infringement and the end of the often lengthy enforcement proceedings by the competition authorities. Secondly, the infringer should not profit from long proceedings to the detriment of the claimant. The third purpose is to enhance the deterrence effect of private antitrust enforcement.<sup>475</sup>
- (DE.13) For cases predating the 7<sup>th</sup> antitrust reform which entered into force on 1 July 2005 and to which §849 BGB applies, the purpose could be considered to be compensatory in nature. This means that the interest payment is a compensation for not having been able to use the monetary amount equivalent to the amount of damages during the period of time the claimant was deprived of it.<sup>476</sup>

**1.5. What is the legal basis for the payment of interest (statutes, contractual agreements, case-law, soft law guidance)?**

- (DE.14) Since the 7<sup>th</sup> law reform of German antitrust law in 2005, the specific antitrust legal basis for the payment of interest is statutory and enshrined in §33(3) fourth and fifth sentence GWB. Before 2005, the interest payment for damages claims would be determined according to the general law of obligations under §291 BGB in conjunction with §288(1) second sentence BGB, which gives rise to interest payments from the moment the antitrust damage action is filed in court.

**1.6. What are the procedures for the party seeking to receive interest on the damages paid? (for example, does the claimant have to make a separate plea for the interest payments and if so, what information and evidence must be supplied?)**

- (DE.15) For cases after the 7<sup>th</sup> antitrust law reform, as soon as the claimant brings a claim for antitrust damages under §33(3) first sentence GWB, and the court has decided according to §287 of the Code of Civil Procedure (ZPO) on the amount of damages, interest is payable automatically on the amount of pecuniary damages according to §33(3) fourth sentence GWB in conjunction

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<sup>474</sup> MünchKomm-BGB/Wagner, 6. Aufl., §849 Rn. 6

<sup>475</sup> Langen/Bunte, 12. Aufl., §33 Rn. 159, Begr. (Explanatory Statement for 7<sup>th</sup> antitrust law reform) 2004, p. 54.

<sup>476</sup> MünchKomm-BGB/Wagner, 6. Aufl., §849, Rn. 2; BeckOK-BGB/Spindler, 33 ed., §849, Rn. 1-2.

with §288 and §289 BGB.<sup>477</sup> No extra information or evidence, like actual damage or causality, needs to be provided to give rise to interest payments.<sup>478</sup>

- (DE.16) The same is true for damage claims preceding the 7<sup>th</sup> antitrust reform, for which §849 BGB in conjunction with §246 BGB applies, which do not require any independent proof to give rise to interest payments.<sup>479</sup>

## Section II. Calculation of Interest

### 2.1. What is the rate of interest that is set? How is it arrived at? Are there statutes?

Standard case: basic rate of interest plus 5.00%

- (DE.17) According to §33(3) fourth and fifth sentence GWB read in conjunction with §288(1) BGB, the rate of interest is set by adding 5 percentage points to the basic rate of interest. The basic rate of interest is defined in §247 BGB and is variable, being recalculated every six months (i.e. on January 1<sup>st</sup> and July 1<sup>st</sup> of every calendar year). The reference rate is the interest rate for the most recent main refinancing operation of the European Central Bank.

Special case: basic rate of interest plus 9.00%

- (DE.18) Under rare circumstances in the case of antitrust damages, the interest could be calculated on the basis of §288(2) BGB, which provides that the interest rate shall be 9 percentage points (prior to 29 July 2014: 8 percentage points) above the basic rate of interest. This provision applies to cases in which two cumulative conditions are met. Firstly, the claim must consist of a claim for payment in commercial transactions (*‘Entgeltforderungen’*)<sup>480</sup>, i.e. the payment in return for goods or for the provision of services in transactions between undertakings.<sup>481</sup> Secondly, the claim must relate to a transaction to which a consumer is not a party.
- (DE.19) In *VBL Gegenwert*, the BGH clarified the relationship between §33(3) fifth sentence GWB and §288 BGB. The court noted firstly that §33(3) fifth sentence GWB referred to §288 BGB as a whole. Therefore the higher interest rate under §288(2) BGB was not *per se* excluded in antitrust damages cases just because antitrust damages claims generally arose out of delict/tort and not out of a legal transaction (*‘Rechtsgeschäft’*). It held that the wording of §288(2) BGB referring to “*legal transactions to which a consumer is not a party*” is to be read in the context of antitrust damages actions as “*damage claims according to §33(3) first sentence GWB, which are not brought by consumers*”.<sup>482</sup>

<sup>477</sup> Most courts limit themselves to holding that “*Der Zinsanspruch folgt aus §33 Abs. 3 Satz 4 GWB*” (translation: “*Interest is payable according to § 33(3) fourth sentence GWB*”), e.g. LG Düsseldorf, Urteil vom 13. November 2013, VI-U (Kart) 11/13, U (Kart) 11/13, WuW/E DE-R 4117-4128 or do not refer to the relevant provision at all and simply hold in the order (*‘Tenor’*) that interest is payable, e.g. OLG Frankfurt, Urteil vom 21. Dezember 2010 - 11 U 37/09 (Kart).

<sup>478</sup> MünchKomm-BGB/Ernst, 6. Aufl., §288 Rn. 4. *A contrario*, a defendant cannot escape interest payments by claiming that the claimant did not suffer any damages due to foregone interest payments (“*Kein Gegenbeweis geringeren Schadens*”), MünchKomm-BGB/Ernst, 6. Aufl., §288 Rn. 18.

<sup>479</sup> MünchKomm-BGB/Wagner, 6. Aufl., §849, Rn. 2; BeckOK-BGB/Spindler, 33 ed., §849, Rn. 2.

<sup>480</sup> BGH, judgment of 6 November 2013, *VBL Gegenwert*, KZR 58/11, Tz. 69, WuW/E DE-R 4037-4049.

<sup>481</sup> According to e.g. BSG, Urteil vom 02. Juli 2013 - B 1 KR 18/12 R -, juris, (Tz. 48) the definition of *‘Entgeltforderung’* derives from Art. 1 and Art. 2 of Directive 2000/35 on late payments.

<sup>482</sup> BGH, judgment of 6 November 2013, *VBL Gegenwert*, KZR 58/11, Tz. 68, WuW/E DE-R 4037-4049.

(DE.20) Secondly, the court noted that the scope of application §288(2) BGB by analogy to antitrust damages cases was narrow due to the far-reaching consequences of its application.<sup>483</sup> The higher rate of interest could be applicable in cases in which the antitrust damage related to a payment claim (*‘Entgeltforderung’*) of the victim in abuse of dominance cases.<sup>484</sup> The BGH mentioned as examples systematic late payments by the dominant undertaking or the extraction of unjustifiably low prices by powerful buyers.<sup>485</sup> Braun and Raff critically remark that unjust enrichment cases that lead to antitrust damages (e.g. in case of too high payments requested by a defendant in an antitrust damages proceeding), should also profit from the higher rate of interest, as they are ultimately the ‘mirror image’ of a payment claim.<sup>486</sup>

For damage that occurred between 1 January 1985 and 1 July 2005

(DE.21) For damage predating 1 July 2005, interest also starts to accrue from the moment the harm occurred, but it does so on the basis of §849 BGB in conjunction with §246 BGB<sup>487</sup>. According to §246 BGB, the amount of interest to be paid is however fixed at 4.00% per year, it is thus lower than under §288(1) BGB. §246 BGB provides for a standard rule of 4.00% of yearly interest, which is supported by the dominant opinion in literature and is applied by most courts.<sup>488</sup> There is however also a minority opinion which supports an application of §849 BGB in conjunction with §288(1), which would yield an interest rate of 5.00% above the basic rate of interest.<sup>489</sup> This interpretation of §849 BGB could potentially also be extended to the special interest rate of 9.00% above the basic rate of interest under §288(2) BGB.

## 2.2. Is interest simple or compound? If the interest is neither simple nor compound as defined above, please elaborate.

(DE.22) Interest is simple. For cases after the 7<sup>th</sup> antitrust law reform, §33(3) fourth and fifth sentence GWB, read in conjunction with §289 first sentence BGB (prohibition of compound interest, cf. Question 1.2), precludes compound interest payments for antitrust damages.

(DE.23) Nonetheless under §289 second sentence BGB, any damages resulting from delayed payment of interest can be claimed under the general heading of damages according to §288(4), §280(1), §280(2), and §286 BGB.<sup>490</sup> Under the general provisions for damages, the claimant must however show that the delayed payment of interest has caused damage (this is quite similar to the common law notion of interest *as* damage, cf. the report for United Kingdom).

(DE.24) For cases before the entry into force of the 7<sup>th</sup> law reform on 1 July 2005, §289 first sentence BGB equally precludes compound interest payments, i.e. interest is also simple. For these cases, interest payments can be claimed on the basis of §849 BGB in conjunction with §246 BGB (or, according to minority opinion, in conjunction with §288 BGB; for a more detailed

<sup>483</sup> BGH, judgment of 6 November 2013, *VBL Gegenwert*, KZR 58/11, Tz. 70-71, WuW/E DE-R 4037-4049.

<sup>484</sup> In this particular case the provision at stake was §19(1) GWB.

<sup>485</sup> BGH, judgment of 6 November 2013, *VBL Gegenwert*, KZR 58/11, Tz. 71, WuW/E DE-R 4037-4049.

<sup>486</sup> Raff/Braun, GPR 3/2014, 146-149.

<sup>487</sup> OLG Karlsruhe, judgment of 27 August 2014 - 6 U 116/11 (Kart) -, juris (Tz. 156-165).

<sup>488</sup> OLG Karlsruhe, judgment of 27 August 2014 - 6 U 116/11 (Kart) -, juris (Tz. 163) by reference to BGH, NJW 2008, 1084 Rn. 3; Sprau in Palandt, BGB, 73. Aufl. §1; Rüßmann in juri sPK-BGB, §849 BGB Rn. 4, and Bueren, WuW 2012, 1060.

<sup>489</sup> OLG Karlsruhe, judgment of 27 August 2014 - 6 U 116/11 (Kart) -, juris (Tz. 163) by reference to Wagner in Münchener Kommentar zum BGB, 6. Aufl., §849 BGB Rn. 6.

<sup>490</sup> MünchKomm-BGB/Ernst, 6. Aufl., §289 Rn. 1.

discussion, cf. Question 2.1). Under §849 BGB there is only the option to either claim statutory interest payments in conjunction with §246 BGB (no further evidence necessary) or by proving that there has been damage because of the foregone use of the monetary amount equal to the amount of damages, which was not available to the claimant. These two remedies cannot be however added up for the same period of time.<sup>491</sup>

**2.3. What is the time for which interest is calculated? When does interest start to accrue, when does the accrual of interest end? Are there any situations where the action of the plaintiff, for example delay on his part, serves to change the time for which interest is calculated? Are there provisions for suspension of the accrual of interest?**

(DE.25) According to §33(3) fourth sentence GWB, the interest starts to accrue from the moment the harm occurred and ends, in accordance with §288 BGB, once the defendant has paid the full amount of damages.<sup>492</sup>

(DE.26) For damages between 1 January 1998 and 1 July 2005, i.e. before entry into force of §33(3) fourth sentence GWB on 1 July 2005, the old version of §33(1) GWB is applicable. For cases between 1985 and 1 January 1998, §35(1) GWB, which was at force at the time, applies. As old §33(1) GWB and older §35(1) GWB do not have any specific provisions for interest payments for antitrust damages, the general BGB provisions apply. This means that for damage predating 1 July 2005, interest also starts to accrue from the moment the harm occurred, but it does so on the basis of §849 BGB in conjunction with §246 BGB.<sup>493</sup> According to §246 BGB, the amount of interest to be paid is however fixed at 4.00% per year, it is thus lower than under §288(1) BGB, which provides for interest payment of 5.00% above the basic rate of interest per year (cf. Question 2.1 on minority opinion which argues that §849 BGB applies not in conjunction with §246 BGB, but in conjunction with §288 BGB).

(DE.27) As interest starts to accrue in any case the moment the damage took place, delay cannot change the time from which interest is calculated. Neither GWB nor BGB have specific provisions for the suspension of accrual of interest.

**2.4. Are there any specific provisions if payment is requested in a different currency than that in the state where the lawsuit is brought? (e.g. a Swedish company claims for damages resulting from an EU-wide cartel against a German cartel member in Germany. Can the court award only EUR or also Swedish Krona?)**

(DE.28) There are no specific provisions if payment is requested in a different currency than Euro. As long as German law is applicable, which is not determined by the currency in which damages are claimed, the applicable provisions for interest payments remain those of §288 BGB.<sup>494</sup>

**2.5. As damage claims for infringements of EU competition rules often pertain to long-running infringements, please include all applicable interest rates and the date the rate came into force from 1 January 1985 until today. Unless impossible due to national peculiarities, the rates should be listed in a two column table, containing the rate and the date it came into force. This should be accompanied by a legal retrospective that sets out**

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<sup>491</sup> MünchKomm-BGB/Wagner, 6. Aufl., §849, Rn. 9; BeckOK-BGB/Spindler, 33 ed., §849, Rn. 3.

<sup>492</sup> MünchKomm-BGB/Ernst, 6. Aufl., §288 Rn. 17.

<sup>493</sup> OLG Karlsruhe, judgment of 27 August 2014 - 6 U 116/11 (Kart) -, juris (Tz. 156-165).<sup>494</sup> BeckOK-BGB/Grothe (Stand 1.2.2014), §244 Rn. 30; in the same line, MünchKomm-BGB/Ernst, 6. Aufl., §291 Rn. 7.

<sup>494</sup> BeckOK-BGB/Grothe (Stand 1.2.2014), §244 Rn. 30; in the same line, MünchKomm-BGB/Ernst, 6. Aufl., §291 Rn. 7.

**any other changes to the relevant interest regime (e.g. the time interest starts to run etc.) which occurred over this period, in order to allow a determination of which rules applied at a given point in time between 1 January 1985 and today.**

- (DE.29) For all cases after the entry into force of the 7<sup>th</sup> antitrust law reform on 1 July 2005, §33(3) fourth and fifth sentence GWB applies in conjunction with §288 BGB.
- (DE.30) For cases before the entry into force of the 7<sup>th</sup> antitrust law reform, according to dominant opinion in literature and case-law, §849 BGB applies in conjunction with §246 BGB (further details in Question 2.1). As §246 BGB provides for a uniform statutory interest rate of 4.00% per year, interest for antitrust damages that occurred before 1 July 2005 will be 4.00% per year since the moment the damage took place.
- (DE.31) If however the minority opinion were followed, according to which §849 BGB applies not in conjunction with §246 BGB, but in conjunction with §288 BGB, the situation is more complex. Under §288 BGB, the interest rate applicable to damages that occurred in the period of 1 January 1985 until 30 April 2000 is determined by the old version of §288 BGB which provided for an annual interest rate of 4.00%.<sup>495</sup> Subsequently, there was an *interim* version of §288 BGB which was in force from 1 May 2000 until 31 December 2001 which referred to an interest payment of the amount of 5.00% above the basic rate of interest as determined according to §1 DÜG. From 1 January 2002, §288 BGB entered into force in its current form, referring to the basic rate of interest as determined according to §247 BGB (further details in Question 2.1).

Table 1 - Interest Rates

Interest Rate before 1 January 1999	
Date	Rate
01/01/1985 - 30/04/2000	4.00%

  

Basic Rate of Interest from 1 May 2000 until 31 December 2001 (to which then according to the <i>interim</i> version of §288(1) BGB 5.00% are added)	
Date	Rate
01/05/2000	3.42% (DÜG)
01/09/2000	4.26% (DÜG)
01/09/2001	3.62% (DÜG)
01/01/2002	2.57% (§247)

  

Basic rate of interest since 1 January 2002 (to which then according to §288(1) BGB 5% or in case of §288(2) BGB 8% <sup>496</sup> are added)	
Date	Rate
01/07/2002	2.47% <sup>497</sup>
01/01/2003	1.97%

<sup>495</sup> *Supra* note 12.

<sup>496</sup> 9% as of 29 July 2014.

<sup>497</sup> Onwards §247 applies, since DÜG expired on 4 April 2002.

01/07/2003	1.22%
01/01/2004	1.14%
01/07/2004	1.13%
01/01/2005	1.21%
01/07/2005	1.17%
01/01/2006	1.37%
01/07/2006	1.95%
01/01/2007	2.70%
01/07/2007	3.19%
01/01/2008	3.32%
01/07/2008	3.19%
01/01/2009	1.62%
01/07/2009	0.12%
01/01/2010	0.12%
01/07/2010	0.12%
01/01/2011	0.12%
01/07/2011	0.37%
01/01/2012	0.12%
01/07/2012	0.12%
01/01/2013	-0.13%
01/07/2013	-0.38%
01/01/2014	-0.63%
01/07/2014	-0.73%
01/01/2015	-0.83%

**2.6. Please identify an official, reliable, publicly available source that publishes the pertinent legal interest rates as they change.**

(DE.32) The German Central Bank (*Bundesbank*) has the duty to publish the current basic rate of interest according to §247(2) BGB in the official Federal Gazette (*Bundesanzeiger*). The Federal Gazette is available online at <http://www.bundesanzeiger.de>. The official publications of the basic rate of interest can be found by searching for ‘*Basiszinssatz*’ and limiting the search area to the official section (‘*Amtlicher Teil*’) of the Federal Gazette.



- (DE.33) They can also be found in the monthly reports of the Bundesbank under the section ‘Base Rates’, which can be found online at [http://www.bundesbank.de/Navigation/EN/Publications/Monthly\\_reports/monthly\\_reports.html](http://www.bundesbank.de/Navigation/EN/Publications/Monthly_reports/monthly_reports.html) Alternatively, the rates can also be found directly on the website of the Bundesbank at [http://www.bundesbank.de/Redaktion/EN/Standardartikel/Bundesbank/Interest\\_rates/base\\_rate\\_of\\_interest.html?seGWBhGWBhive=0&submit=SeGWBh&seGWBhIssued=0](http://www.bundesbank.de/Redaktion/EN/Standardartikel/Bundesbank/Interest_rates/base_rate_of_interest.html?seGWBhGWBhive=0&submit=SeGWBh&seGWBhIssued=0).

**2.7. If interest rates change on a fixed schedule, please indicate the schedule.**

- (DE.34) According to §247 BGB, the basic rate of interest changes twice in the calendar year, on January 1<sup>st</sup> and July 1<sup>st</sup>. It is on the basic rate of interest upon which the interest for antitrust damages claims is calculated according to §33(3) fourth and fifth sentence GWB in conjunction with §288 BGB (for further details on §288 BGB, cf. Question 2.1).

**2.8. If part of the debt / the damage is being paid, how is interest calculated following that payment? In particular, do partial payments first cover interest or the principal amount? Is there any provision or legal practice similar to Art. 86(3)(2) of the rules of application of Regulation 966/2012 on the financial rules applicable to the general budget of the Union where it is stated that “Any partial payments shall first cover the interest”?**

- (DE.35) In OLG Karlsruhe, judgment of 27 August 2014 - 6 U 116/11 (Kart) at para. 167, it appears that the partial payment first covered the principal amount.<sup>498</sup> §367 BGB could offer a legal basis according to which partial payments should first cover the interest, which states that “*If the obligor must pay interest and costs in addition to the principal performance, an act of performance not sufficient to redeem the entire debt is first credited to the costs, then to the interest and finally to the principal performance*”. The payment of the damages would then have to be considered as the principal performance.

**2.9. Please calculate interest in the following hypothetical case. All dates are given in the format dd.mm.yyyy. All amounts are stated without specifying the currency to abstract from implications of the introduction of the common Euro currency. Assume that the claims have not been time barred. Assume that a national court in the Member State on which you are reporting has jurisdiction to rule on the case. Assume that the cartelists are jointly liable for the damage caused by the cartel. If results differ materially depending on whether accrual of interest is based purely on national law or made in compliance with the EU principle of full compensation, provide both calculations.**

**There was a long running pan-European cartel for a product that materially affected trade between Member States. The cartel lasted from the beginning of 1993 until the dawn raids (unannounced inspections) of the European Commission on 02.02.2009.**

**On 30.11.2010, a longtime customer of the cartel, who bought the cartelised product in the Member State on which you are reporting, brings a claim for damages against three cartelists (A, B, and C). All of the three defendants have their seat in the Member State on which you are reporting. The customer only bought the cartelised product of the cartelists A and B. In the writ, the claimant specifies the damages caused by the cartel and the date on which the respective damage occurred. The claimant also specifically**

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<sup>498</sup> “Die Beklagte hat an die Klägerin am 25.10.2013 einen Betrag in Höhe von 100.824,80€ bezahlt. Damit schuldet die Beklagte hinsichtlich dieses Betrages lediglich bis zum 25.10.2013 Zinsen” (translation: “On 25 October 2013, the defendant has paid an amount of 100.824,80€ to the claimant. Therefore, the defendant only owes interest for this amount until 25 October 2013 to the claimant”).

requests that interest be paid on the damages. The damages (always = 100) and respective dates are set out in Table 2 below. Should a subjective rate be of relevance, you will find the ROI (Return On Investment) rates of the claimant and the three defendants in Table 3 below. You will also find the average interest rate that the claimant had to pay on credit taken out in that year (claimant's average refinance rate).

On 26.11.2013 a court renders a final judgment, ordering the defendant(s) to pay damages and interest. The defendants take until 12.02.2014 to pay. Please specify the total amount the jointly liable defendants have to pay on 12.02.2014 in order to relinquish their debt towards the claimant.

Table 2 - Damages Amounts and Dates

Date	Interest
15/11/1993	100
17/09/1996	100
22/02/2006	100
12/08/2008	100

Table 3 - Refinance and Return on Investment Rates

Year	Claimant's Refinance Rate	Claimant's Annual ROI	Defendant's A Annual ROI	Defendant's B Annual ROI	Defendant's C Annual ROI
1993	6.00%	5.50%	4.00%	4.00%	3.00%
1994	6.00%	9.80%	4.00%	4.00%	4.00%
1995	6.00%	9.50%	4.00%	4.00%	5.00%
1996	6.00%	1.00%	0.00%	0.00%	0.00%
1997	8.00%	-3.80%	1.00%	1.00%	3.00%
1998	8.00%	1.10%	4.00%	4.00%	5.00%
1999	8.00%	2.80%	1.00%	1.00%	3.00%
2000	8.00%	1.10%	-2.00%	-1.00%	0.00%
2001	8.00%	4.51%	2.00%	2.00%	3.00%
2002	8.00%	5.30%	4.00%	4.00%	5.00%
2003	8.00%	8.21%	9.00%	9.00%	9.00%
2004	7.00%	9.00%	3.00%	3.00%	2.00%
2005	7.00%	10.00%	1.00%	1.00%	1.00%
2006	7.00%	6.00%	1.00%	1.00%	1.00%
2007	5.00%	-5.00%	4.00%	4.00%	2.00%
2008	5.00%	-7.00%	-1.00%	0.00%	0.00%
2009	5.00%	-5.00%	2.00%	2.00%	4.00%
2010	5.00%	-3.00%	4.00%	4.00%	4.00%
2011	5.00%	-2.70%	4.00%	4.00%	2.00%
2012	5.00%	1.61%	-2.00%	-1.00%	0.00%
2013	5.00%	4.40%	8.00%	8.00%	7.00%
2014	5.00%	1.41%	-4.00%	-3.00%	-1.00%

- (DE.36) The interest will start to accrue on 15 November 1993 until 12 February 2014 when the defendant actually effects the payment to the claimant.
- (DE.37) For all damage that occurred prior to 1 July 2005 (Damage 1 and Damage 2), §849 BGB in conjunction with §246 BGB require the defendants to pay 4.00% of interest per year on the amount of damages.<sup>499</sup> Interest of the amount of 4.00% per year would start to accrue from the moment the damage occurred, i.e. 15 November 1993, until the moment of filing the claim, i.e. 30 November 2010. From the moment of filing the claim, the interest provisions of §291 BGB in conjunction with §288 BGB (interest during legal proceedings) would apply, requiring the defendants to pay 5.00% above the basic rate of interest on the amount of damages.
- (DE.38) For damages occurring after the entry into force of the 7<sup>th</sup> antitrust law reform on 1 July 2005 (Damage 3 and Damage 4), §33(3) fourth and fifth sentence GWB in conjunction with §288 BGB would be applicable, requiring the defendants to pay 5.00% above the basic rate of interest on the amount of damages. The calculation of interest payments would thus be as follows.

## Damage 1

From	To	Amount	Interest Rate	Total Days	Interest
15/11/1993	11/29/2010	100	4.00%	6224	68.15
11/30/2010	06/30/2011	100	5.12%	213	2.99
07/01/2011	12/31/2011	100	5.37%	184	2.71
01/01/2012	12/31/2012	100	5.12%	366	5.12
01/01/2013	06/30/2013	100	4.87%	181	2.41
07/01/2013	12/31/2013	100	4.62%	184	2.33
01/01/2014	02/12/2014	100	4.37%	42	0.50
Total Interest (D.1)					<b>84.22</b>

## Damage 2

From	To	Amount	Interest Rate	Total Days	Interest
09/17/1996	11/29/2010	100	4.00%	5187	56.80
11/30/2010	06/30/2011	100	5.12%	213	2.99
07/01/2011	12/31/2011	100	5.37%	184	2.71
01/01/2012	12/31/2012	100	5.12%	366	5.12
01/01/2013	06/30/2013	100	4.87%	181	2.41
07/01/2013	12/31/2013	100	4.62%	184	2.33
01/01/2014	02/12/2014	100	4.37%	42	0.50
Total Interest					<b>72.86</b>

<sup>499</sup> Before the entry into force of the 7<sup>th</sup> antitrust law reform, German courts have usually only granted interest from the moment of filing of the claim (§291 BGB in conjunction with §288 BGB). This can be however explained in many cases by the fact that the claimant only demanded interest from the moment of filing the claim, not because the law precluded interest payments from the moment the damage took place. For a more detailed discussion on this issue, cf. Bueren, E. (2013), *Die Berücksichtigung der Anspruchsentwertung im Zeitablauf bei Schadensersatz wegen Verstößen gegen EU-Kartellrecht, Eine rechtsvergleichende Studie (Approaches to Considering the Devaluation of Monetary Claims for Damages from Infringements of EU Competition Law - A Comparative Law Study)*, Rabel Journal of Comparative and International Private Law, Vol. 77, No. 3, pp. 504-554.

## Damage 3

From	To	Amount	Interest Rate	Total Days	Interest
02/22/2006	06/30/2006	100	6.37%	129	2.25
07/01/2006	12/31/2006	100	6.95%	184	3.50
01/01/2007	06/30/2007	100	7.20%	181	3.57
07/01/2007	12/31/2007	100	8.19%	184	4.13
01/01/2008	06/30/2008	100	8.32%	182	4.14
07/01/2008	12/31/2008	100	8.19%	184	4.12
01/01/2009	06/30/2009	100	6.62%	181	3.28
07/01/2009	06/30/2011	100	5.12%	730	10.24
07/01/2011	12/31/2011	100	5.37%	184	2.71
01/01/2012	12/31/2012	100	5.12%	366	5.12
01/01/2013	06/30/2013	100	4.87%	181	2.41
07/01/2013	12/31/2013	100	4.62%	184	2.33
01/01/2014	02/12/2014	100	4.37%	42	0.50
Total Interest (D.3)					<b>48.31</b>

## Damage 4

From	To	Amount	Interest Rate	Total Days	Interest
08/12/2008	12/31/2008	100	8.19%	142	3.18
01/01/2009	06/30/2009	100	6.62%	181	3.28
07/01/2009	06/30/2011	100	5.12%	730	10.24
07/01/2011	12/31/2011	100	5.37%	184	2.71
01/01/2012	12/31/2012	100	5.12%	366	5.12
01/01/2013	06/30/2013	100	4.87%	181	2.41
07/01/2013	12/31/2013	100	4.62%	184	2.33
01/01/2014	02/12/2014	100	4.37%	42	0.50
Total Interest (D.4)					<b>29.77</b>

Total Interest (D.1 - D.4)	<b>235.16</b>
Total (D.1 - D.4)	<b>435.16</b>
<b>Total Debt</b>	<b>635.16</b>

(DE.39) The total amount of interest for the damages the jointly liable defendants would have to pay on 12.02.2014 would be 235.16, in addition to the 400 of damages. Therefore, the entire sum the jointly liable defendants have to pay on 12.02.2014 in order to relinquish their debt towards the claimant would be 635.16.

### ***Section III. Procedural Aspects***

#### **3.1. Does the judge award interest *ex officio* or does the claimant have to request it?**

(DE.40) According to §308(1) ZPO, the court cannot award more to claimants than they have requested, in particular in the case of interest. This means that the interest has to be requested by the claimant.

#### **3.2. Can the judge award a higher interest amount than requested by the claimant or does the principle of *ne ultra petita* apply?**

(DE.41) The principle of *ne ultra petita* applies (which follows in particular for the amount of interest payments from §308(1) ZPO, cf. e.g. OLG Karlsruhe, judgment of 27 August 2014 - 6 U 116/11 (Kart), at para. 165).

#### **3.3. Can the judge estimate interest or does interest always have to be calculated?**

(DE.42) Under §33(3) third sentence GWB in conjunction with §287 ZPO, the judge can estimate the amount of damage, which necessarily has an impact on the ultimate amount of interest payments the claimant will receive. The interest applicable is to be calculated according to §33(3) fourth and fifth sentence GWB in conjunction with §288 BGB. The same applies to interest on damages claims before the entry into force of the 7<sup>th</sup> antitrust law reform on 1 July 2005, when interest is claimed on the basis of §849 BGB,<sup>500</sup> where the interest applicable is to be calculated according to §246 BGB (or according to minority opinion also on the basis of §288 BGB).

#### **3.4. If the claimant changes the request regarding the interest, is this regarded as an amendment of the pleadings? Is this only possible until a certain stage into the proceedings and precluded later on or can the claimant make such changes without negative procedural consequences at any time up to the judgment?**

(DE.43) If the claimant changes the request regarding the amount of interest on the same legal basis, this would not be regarded to be an amendment to the claim/pleadings under §264(2) ZPO and can be brought at any stage before closure of the proceedings.<sup>501</sup>

### ***Section IV. Specific Instances***

#### **4.1. Identify any cases relating to damages claims for infringements of competition law and explain how interest was calculated. In writing these summaries, provide all relevant information about how interest was calculated, so that this information can be passed on to another country reporter who can try and estimate how interest would be calculated in another jurisdiction.**

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<sup>500</sup> MünchKomm-BGB/Wagner, 6. Aufl., §849, Rn. 9; BeckOK-BGB/Spindler, 33 ed., §849, Rn. 4.

<sup>501</sup> MünchKomm-ZPO/ Becker-Eberhard, 4. Aufl., §264 Rn. 13-15.

#### Search methodology

(DE.44) To find relevant cases on interest payments in antitrust damages claims, we used the German case-law database Juris (available online at <http://www.juris.de>). We conducted the search with three different search terms:

- 1) ‘§33 Abs 3 GWB’ in the search field for the legal provision, together with a text search for the term ‘Zins’ (German word for interest) to find all relevant cases decided according to §33(3) GWB since the 7<sup>th</sup> reform of German antitrust law in 2005;
- 2) ‘§33 Abs 1 GWB’ in the search field for the legal provision, together with a text search for the term ‘Zins’ to find all relevant cases decided between 1 January 1998 and 31 December 2004; for this period the relevant provision to bring private antitrust damages claims was §33(1) GWB;
- 3) ‘§35 Abs 3 GWB’ in the search field for the legal provision, together with a text search for the term ‘Zins’ to find all relevant cases decided before 1998.

We excluded the following types of cases:

- decided by first instance courts (*Landgerichte* - LG);
- cases in which the issue of interest related to interest for lawyer fees only and not to the damage claim itself;
- cases in which the defendant claimed interest for damages, but the court did not discuss the issue in the judgment itself, e.g. because it decided not to grant damages to the claimant.

i. *BGH, Urteil vom 06. Oktober 1992 - KZR 10/91 -, BGHZ 119, 335-346*

**Facts:** market: green energy sources, electricity feed-in; claim: stand-alone; legal provisions: §26 GWB old version (now §§19-20 GWB - abuse of dominance) and §35(1) GWB old version (now §33(3) GWB); claimant asked for damages plus interest of 8.00% (in total, not above a variable basic rate of interest, which did not enter the BGB system until 1999).

**Judgment:** the court awarded interest claims on basis of §284(1), §286(1) and §288 BGB old version, i.e. interest since the moment the defendant received the claim.

**Relevant point:** the judgment did not contain the specific amount of interest that was awarded to the defendant, but, as it was awarded on the basis of §288 BGB old version, it must have been 4.00% annually; the judgments from the lower instance courts, which could show the amount of interest ultimately awarded, are not available online (OLG Stuttgart 2. Zivilsenat, 22. März 1991, Az: 2 U 51/90 and LG Stuttgart 17. Zivilkammer, 30. Januar 1990, Az: 17 O 648/88).

ii. *OLG Düsseldorf, Urteil vom 16. April 2008 - VI-2 U (Kart) 8/06, 2 U (Kart) 8/06 -, juris*

**Facts:** market: district heating and gas (different energy sources for heating); claim: stand-alone; legal provisions: claim brought under §§19-20 GWB (tying) in conjunction with §33(1) GWB new version; claimant asked for an injunction (§33(1) GWB) and damages plus interest of 5.00% above basic rate of interest.

**Judgment:** the court ruled in favour of claimant.

**Relevant point:** the court granted interest of 5.00% above basic rate of interest, but, as damages claimed concerned forgone future profits, the court only granted interest from the moment future profits would likely have accrued.

- iii. *KG Berlin, Urteil vom 01. Oktober 2009 - 2 U 17/03 Kart -, juris*  
(very similar: *KG Berlin, Urteil vom 01. Oktober 2009 - 2 U 10/03 Kart -, juris*)

**Facts:** market: readymix concrete ('*Transportbeton*'); claim: follow-on; legal provisions: §1 GWB (quota cartel) in conjunction with §33(3) GWB; court based decision on old §35(1) GWB (predecessor of current § 33(3) GWB and old §33(1) GWB) though, because harm had occurred at time old version was in force<sup>502</sup>; claimant asked for damages plus interest since moment filing proceedings on basis of §33 GWB (new version).

**Judgment:** the court ruled in favour of claimant.

**Relevant point:** the court only ruled on amount of damages based on price difference between cartelized and estimated (§275 ZPO) market price and did not discuss award of interest; it just held in the order ('*Tenor*') that it awarded 5.00% over the basic rate of interest since moment claim was filed ('*seit Rechtshängigkeit*').

- iv. *OLG Celle, Urteil vom 17. Juni 2010 - 13 U 5/10 (Kart) -, juris*

**Facts:** fees for access to electricity network; claim: stand-alone; legal provisions: case brought under §315(3) BGB; damage claimed under unjust enrichment, antitrust damages claims (§§19-20 GWB) only brought as subsidiary claim.

**Judgment:** the court awarded damages plus interest on the main claim (i.e. subsidiary antitrust claim was not considered).

**Relevant point:** even though claimant was aiming at receiving higher rate of interest (8.00%) because damage had occurred due to excess payments for electricity network access in the framework of a contract, the court only awarded interest of 5.00% above basic rate of interest since moment of filing the action (that is what the claimant asked for), because damage was claimed under the heading of unjust enrichment (Rn. 41) and was not an '*Entgeltforderung*' (payment claim) in the sense of §288(2) BGB.

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<sup>502</sup> Rn 37: "*Jedoch gilt nach den allgemeinen Regeln des intertemporären Rechts, dass Schuldverhältnisse grundsätzlich nach demjenigen Recht zu beurteilen sind, welches zur Zeit der Entstehung des Schuldverhältnisses galt. Für den gesetzlichen Schadensersatzanspruch, der auf Grund eines Kartellverstoßes entsteht kann insofern nichts Abweichendes gelten. Da der Kartellverstoß und die Schadensentstehung vorliegend im Jahr 1998 abgeschlossen waren, ist der bis zu diesem Zeitpunkt gültige §35 GWB a.F. anzuwenden. Allerdings ergeben sich hieraus keine inhaltlichen Abweichungen gegenüber der Regelung nach §33 GWB a.F.*" (translation: "According to the general rules of inter-temporal law, obligations are governed by the law which was in force at the moment in time in which the obligation came into being. For the statutory damages claim, which can arise due to violation of antitrust law, the same applies. Since the violation of antitrust rules and the damage at hand ended in 1998, §35 of the old GWB, which was then in force, is applicable. **There do not result any substantive differences in comparison to §33 GWB old version however**"). In relation to the calculation of the amount of antitrust damages, the court held that there are no substantive differences between the version of the GWB in force in 1998 and the current §33(3) GWB.

v. **OLG Frankfurt, Urteil vom 21. Dezember 2010 - 11 U 37/09 (Kart) -, juris**

**Facts:** market: pharmaceuticals; claim: stand-alone; legal provisions: brought under §19 GWB, abuse of dominance by charging prices above the price level which would very likely arise if effective competition existed.

**Judgment:** the court ruled in favour of the claimant.

**Relevant point:** the court awarded damages of the amount of excess prices charge during the period of infringement (01/01/2005 - 31/08/2008); the court charged a 5.00% interest payable from the date of filing the claim at first instance (04/11/2008).

vi. **OLG Düsseldorf, Urteil vom 08. Juni 2011 VI-U (Kart) 2/11, U (Kart) 2/11 , juris**

**Facts:** market: telecom services; claim: hybrid follow-on/stand-alone relied on findings made by the German Federal Cartel Office (*Bundeskartellamt*) (§§19-20 GWB, abuse of dominance for charging to high prices to claimant).

**Judgment:** the court awarded damages and interest.

**Relevant point:** the sections on the award of interest payments are not fully clear; even though the court speaks of ‘*Rechtshängigkeitszinsen*’ (interest since filing of the claim), the court seems to award interest since the moment the damage took place (1997), on the interest rate that was applicable at each moment in time (i.e. before 1 May 2000 4.00%, afterwards 5.00% above basic rate of interest according to the old and new version of §288 BGB in conjunction with §291 BGB<sup>503</sup>).<sup>504</sup>

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<sup>503</sup> §288 BGB: “(1) Eine Geldschuld ist während des Verzugs zu verzinsen. Der Verzugszinssatz beträgt für das Jahr fünf Prozentpunkte über dem Basiszinssatz. (2) Bei Rechtsgeschäften, an denen ein Verbraucher nicht beteiligt ist, beträgt der Zinssatz für Entgeltforderungen neun Prozentpunkte über dem Basiszinssatz. (3) Der Gläubiger kann aus einem anderen Rechtsgrund höhere Zinsen verlangen” (translation: “(1) Any money debt must bear interest during the time of default. The default rate of interest per year is five percentage points above the basic rate of interest. (2) In the case of legal transactions to which a consumer is not a party the rate of interest for claims for payment is nine percentage points above the basic rate of interest. (3) The creditor may demand higher interest on a different legal basis”).

§288 BGB (prior to 30 April 2000 the old version of §288 BGB applied and was worded as follows): “(1) Eine Geldschuld ist während des Verzugs mit vier vom Hundert für das Jahr zu verzinsen. Kann der Gläubiger aus einem anderen Rechtsgrunde höhere Zinsen verlangen, so sind diese fortzuentrichten”. (translation: “(1) In case of delay, money debt is charged with an interest of four of one hundred per year. If the creditor can demand higher interest on a different legal basis, it has to be paid”).

§291 BGB: “Eine Geldschuld hat der Schuldner von dem Eintritt der Rechtshängigkeit an zu verzinsen, auch wenn er nicht im Verzug ist; wird die Schuld erst später fällig, so ist sie von der Fälligkeit an zu verzinsen. Die Vorschriften des § 288 Abs. 1 Satz 2, Abs. 2, Abs. 3 und des § 289 Satz 1 finden entsprechende Anwendung”. (translation: “The obligor must pay interest on a money debt from the date when litigation is pending onwards, even if he is not in default; if the debt only falls due later, interest must be paid from its due date onwards. The provisions of section 288 (1) sentence 2, (2) and (3) and section 289 sentence 1 apply with the necessary modifications”).

<sup>504</sup> 397

Der Anspruch der Klägerin auf Rechtshängigkeitszinsen ist unter Berücksichtigung dessen, dass die weitergehende Klage bereits durch Urteil des 2. Kartellsenats des Oberlandesgerichts Düsseldorf [VI- 2U (Kart) 10/05] vom 16.05.2007 rechtskräftig abgewiesen worden ist, in Höhe von 4 % aus 15.278.214,09 € und in Höhe von fünf Prozentpunkten über dem Basiszinssatz aus weiteren 10.516.941,19 € jeweils seit dem 17.01.2005 begründet. Dies ergibt sich aus §§ 291, 288 BGB in der bis zum 30.04.2000 geltenden Fassung in Verbindung mit Art. 229 § 5 Satz 1 und § 1 Abs. 1 Satz 2 EGBGB sowie aus §§ 291, 288 BGB in der derzeit geltenden Fassung in Verbindung mit Art. 229 § 5 Satz 1 und § 1 Abs. 1 Satz 2 sowie § 7 Abs. 1 Nr. 1 EGBGB.



- vii. *OLG Karlsruhe, Urteil vom 31. Juli 2013 - 6 U 51/12 (Kart) -, juris*  
(first instance: *LG Mannheim, Urteil vom 04. Mai 2012 - 7 O 436/11 Kart, 7 O 436/11 -, juris*)

**Facts:** market: fire trucks; claim: follow-on; legal provisions: claim brought under *inter alia* §1 and §33 GWB; claimant asked for damages plus interest of 8.00% above basic rate of interest.

**Judgment:** the court confirmed lower instance court that had awarded interest of 5.00% above basic rate of interest.

**Relevant point:** the first instance court appears to have only granted interest since the moment the claim was filed; damage appears to have occurred in 2004, when municipality paid for cartelized fire truck; lower instance court awarded damages only since 2011 though, without any further explanation.

(Contd.) \_\_\_\_\_

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*Der Senat hat die entscheidungserheblichen Rechtsgrundsätze dazu, nach welchem temporär geltenden Recht sich der Rechtshängigkeitszins insbesondere im Zinssatz bemisst, bereits in seinem Urteil vom 24.11.2010 [VI-U (Kart) 16/10], dem ein anderer Rechtsstreit zwischen den nunmehrigen Parteien um Rechtshängigkeitszinsen in Bezug auf Forderungen aus der Zeit von April 199 bis Januar 2000 zugrunde lag, im Einzelnen dargelegt. Hierauf wird verwiesen. Hiernach gilt im Streitfall.*

399

*§288 BGB in seiner derzeit geltenden Fassung findet nach Art. 229 § 5 Satz 1 EGBGB auf den Schadensersatzanspruch der Klägerin lediglich Anwendung, soweit der Klägerin durch die überhöhte (rechtsgrundlose) Zahlung vom 13.03.2002 in Höhe von 5.881.972,54 DM (= 3.007.404,81 €) ein Schaden entstanden ist.*

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*Alle übrigen schadensbegründenden Zahlungen der Klägerin erfolgten vor dem Stichtag des Art. 229 § 5 Satz 1 EGBGB am 01.01.2002, so dass die daraus resultierenden Schadensersatzansprüche (bzw. Bereicherungsansprüche) insbesondere hinsichtlich der Regelungen zur Höhe des Verzugs- oder Prozesszinsanspruchs (vgl. Heinrichs in Palandt, BGB, 68. Aufl., EGBGB 229 § 5 Rn. 5) nach der genannten Überleitungsvorschrift im Grundsatz dem bis zum 31.12.2001 geltenden Schuldrecht unterliegen. Dies führt allerdings dazu, dass sich der Rechtshängigkeitszins nur für die Hauptforderungen, die durch Zahlungen der Klägerin in der Zeit vom 02.06.2000 bis 05.04.2001 entstanden und fällig geworden sind, im Zinssatz nach § 288 BGB in der seit dem 01.05.2000 geltenden Fassung richten, wobei nach Art. 229 § 7 Abs. 1 Nr. 1 EGBGB jedoch auch insoweit der Basiszinssatz des Bürgerlichen Gesetzbuchs maßgeblich ist.*

401

*Für die durch überhöhte Zahlungen der Klägerin bis zum 30.04.2000 entstandenen und fälligen (§ 271 BGB) Ansprüche führt Art. 229 § 1 Abs. 1 Satz 3 EGBGB demgegenüber zur Geltung der §§ 291, 288 BGB in der bis zum 30.04.2000 geltenden Fassung mit der Folge, dass sich Rechtshängigkeitszinsen in Bezug auf diese Forderungen nach dem Zinssatz von vier Prozent berechnen. Dies betrifft einen Teilbetrag des begründeten Klageanspruchs in Höhe 40.617.214,31 DM (entspricht 20.767.251,91 €), der sich aus den Überzahlungen auf den Abrechnungszeitraum Oktober 1997 bis Februar 2000 (letzte Zahlung am 18.04.2000) abzüglich der Vorteilsanrechnung für den Zeitraum Juli 1998 bis September 1999 ergibt.*

402

*Unter Berücksichtigung der bereits im Verfahren vor dem Senat VI-U (Kart) 4/02 rechtskräftig zuerkannten Teil-Hauptforderung kann die Klägerin somit Rechtshängigkeitszinsen in Höhe von 4 % aus (20.767.251,91 € ./ 4.251.711,49 € =) 16.515.540,42 € sowie in Höhe von 5 Prozentpunkten über dem Basiszinssatz aus weiteren 17.776.006,36 € jeweils seit dem 17.01.2005 verlangen. Während der erste Teil so auch auszusprechen war, ist im Übrigen zu beachten, dass die Klage hinsichtlich Rechtshängigkeitszinsen für nach dem 30.04.2000 entstandene Ansprüche durch insoweit rechtskräftiges Urteil des 2. Kartellsenats des Oberlandesgerichts Düsseldorf vom 16.05.2007 [2U (Kart) 10/05] bereits abgewiesen ist, soweit Rechtshängigkeitszinsen in Höhe von 5 Prozentpunkten über Basiszinssatz aus einem 10.516.941,19 € übersteigenden Betrag verlangt worden sind. Deshalb war der Zinstenor hier entsprechend zu beschränken.*

viii. *OLG Düsseldorf, Urteil vom 13. November 2013 - VI-U (Kart) 11/13, U (Kart) 11/13 -, juris*

**Facts:** market: bathroom fittings; claim: hybrid follow-on/stand-alone (conditions of distribution system hindering online sales - ‘*Fachhandelsvereinbarung*’) had been criticized by the Bundeskartellamt; legal provision: claim brought under Art.101 TFEU in conjunction with §33 GWB; claimant asked for damages plus interest of 5.00% above basic rate of interest for damage occurred in each year since the moment harm started to occur.

**Judgment:** the court awarded damages plus interest as requested.

**Relevant point:** interest payment on basis of §33(3) fourth sentence GWB seemed to follow automatically according to the court (para. 110: “*Der Zinsanspruch ist aus § 33 Abs. 3 Satz 4 GWB gerechtfertigt*”).

ix. *BGH, Urteil vom 6. November 2013, VBL Gegenwert, KZR 58/11, WuW/E DE-R 4037-4049*

**Facts:** market: pension schemes (insurance); legal provisions: §19 and §33 GWB; claimant asked for damages plus interest of 8.00% above basic rate of interest since moment harm occurred in 2005.

**Judgment:** the court reversed lower court and sent the case back for final decision.

**Relevant point:** as the court sent the case back for final decision, there is no precise calculation of interest yet, but it foreshadowed that it would only grant interest of 5.00% above basic rate of interest since moment damage occurred (cf. Question 2.1).

x. *OLG Karlsruhe, Urteil vom 27. August 2014 – 6 U 116/11 (Kart) –, juris*

**Facts:** market: pension schemes (insurance); legal provisions: §19(4) and §33 GWB; claimant asked for damages plus interest of 5.00% until pendency of the claim and of 5.00% above basic rate of interest since moment of pendency of claim.

**Judgment:** the court awarded damages and interest as requested by claimant.

**Relevant point:** the OLG decided several relevant issues relating to interest payments for antitrust damages.

- 1) §33(3) fourth and fifth sentence GWB in conjunction with §288 BGB do not apply to interest payments for damages that occurred prior to entry into force of the 7<sup>th</sup> GWB amendment on 1 July 2005. For antitrust damages that took place before 1 July 2005 interest is nonetheless also payable since the moment it took place, according to §849 BGB in conjunction with §246 BGB. The amount of interest enshrined in §246 BGB (4.00%) is lower than the amount of interest according to §288(1) BGB (5.00% above basic rate of interest) however (para. 162-163).
- 2) The claimant only requested interest payments of a total of 5.00% before pendency of the claim, even though the claimant could have asked for interest of 5.00% above the basic rate of interest for damage that occurred after 1 July 2005 (i.e. § 33(3) forth and fifth sentence GWB were in force). Since the claimant failed to do so, the court could not award a higher amount of interest *ex officio*, because it is bound according to §308(1) second sentence of the ZPO by the request of the claimant (para. 165).

- 3) The court explained that a claimant cannot ask on several parallel bases for interest payments. If the claimant is e.g. already asking for interest payments on the basis of §33(3) fourth and fifth sentence GWB, he/she cannot ask at the same time for interest payments since pendency of the claim on the basis of §291 BGB and/or for interest payments for the antitrust damage under general tort law under §849 BGB (para. 166)

***Section V. Evaluation, Interpretation in conformity with EU Law, and Intertemporal Aspect***

- 5.1. Throughout the report, evaluate how satisfactory are the rules on the calculation of interest perceived to be. In considering this question, identify any law reform proposals in the last 15 years or so, or any major judgments by the higher courts that call into question or change some of the issues pertaining to the award of damages. Please identify changes of relevant national law on interest that will come into force or are currently considered.**

(DE.45) As already mentioned, the 7<sup>th</sup> reform of German antitrust law in 2005 was meant *inter alia* to provide more incentives for private enforcement and adjust to trends at the European level.<sup>505</sup> With the law reform, the rules on the calculation of interest in actions for antitrust damages were explicitly included in the GWB.

- 5.2. For each question where it is relevant, assess the compliance of the national interest rules with the minimum standard prescribed by EU law set out above ('full compensation'). If national law does not grant full compensation, please try to identify an interpretation of national law that guarantees full compensation in conformity with EU law.**

Compound interest

(DE.46) If the CJEU case-law on state aid and Regulation No. 794/2004, which prescribes compound interest payments, would be somehow applicable to interest payments for private antitrust damage claims, §289 BGB, which is an outright ban of compound interest, could be considered not to be conform with EU law.

- 5.3. Finally, when assessing the overall compliance of national law with the principle of full compensation is based on directly applicable EU law, please confirm that national courts have to apply it also in relation to past infringements of EU competition law or the equivalent provisions of the EEA agreement (e.g. cartels starting in the 1990ies and ending in the 2000er years).**

Moment of time from which interest is to be paid

Since 1 January 2005, new §33(3) fourth sentence GWB ensures compliance with EU law as far as it stipulates that interest payments are due from the moment the harm occurred. It appears however that for antitrust harm that occurred before 2005, this provision could not be applicable.<sup>506</sup> Nonetheless, interest payments can still be claimed for antitrust damages that occurred before 1 July 2005 on the basis of §849 BGB in conjunction with §246 BGB (or, according to minority opinion, in conjunction with §288 BGB) since the moment the damage

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<sup>505</sup> Langen/Bunte, 12. Aufl, §33 Rn. 26.

<sup>506</sup> Langen/Bunte, 12. Aufl, §33 Rn. 159, "die Verzinsung nach § 33 Abs.3 S.5 gilt nicht für Altfälle".

took place. In particular, the minority approach would ensure compliance with EU law also for damage claims arising from infringements prior to 2005.

- 5.4. **Regarding the secondary subject of investigation (interest on damages due to infringements of national competition law only), the proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union<sup>507</sup>, if adopted, would make the rules of European Law as outlined above applicable to infringements of national competition law. Recital 12 of the preamble summarises those as follows:**

**“Anyone who has suffered harm caused by an infringement can claim compensation for the actual loss (*damnum emergens*), for the gain of which he has been deprived (*loss of profit* or *lucrum cessans*) plus interest. This is irrespective of whether the national rules define these categories separately or in combination. The payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time, and it should be due from the time the harm occurred until compensation is paid, without prejudice to the qualification of such interest as compensatory or default interest under national law. This is also without prejudice to whether effluxion of time is taken into account as a separate category (interest) or as a constituent part of actual loss of profit. It is incumbent on the Member States to lay down the rules to be applied for that purpose”.**

**Would the right to full compensation as set out by Recital 12 of the proposed directive apply to interest calculation for damages in cases where only national competition law has been infringed and the damage occurred before the implementation of the directive came into force?**

- (DE.47) § 33(3) GWB, which has been in force in relation to damages actions since 1 January 2005 in its current form, is already worded as Article 2(2) of the proposed Directive. According to §33(3) GWB in conjunction with §33(1) GWB, it applies both to infringements of EU antitrust law as well as German antitrust law. The law makes no difference between damages claims in relation to infringements of national law and damages claims in relation to infringements of EU law.

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<sup>507</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, 2013/0185 (COD), 11 June 2013.



## Italy

Maria Luisa Stasi\*

### *Preliminary Matters*

- (IT.1) In Italy, competition law claims for damages can be divided between stand-alone and follow-on actions. No distinction is made between breaches of national and EU competition rules in damages claims.
- (IT.2) As will become clear below, notwithstanding the fact that the principles on the award of compensatory interest on damages due to infringement of competition law have been clearly set by the case-law already in the 1990ies, there is still inconsistency in the way Italian courts award it.
- (IT.3) Finally, due to the fact that in Italy judgments issued by the first instance and appeal courts usually are not publicly available, it is not possible to complete a full list of the relevant case-law.

#### **1.1. What is interest? Is there a definition?**

- (IT.4) The Italian law does not provide a definition of interest. The legal theory and the case-law define the interest as percentage and periodic payment due by the one who utilizes a third-party capital or delays the restitution of it.
- (IT.5) Depending on its economic function, interest can be divided into different categories: default interest, compensatory interest and equivalent (“*corrispettivo*”) interest.<sup>508</sup>
- (IT.6) The prerequisite of the default interest is the debtor’s late payment; this interest has a compensatory function, as it constitutes a lump-sum attribution for the damage caused by the late payment of a pecuniary obligation.
- (IT.7) The compensatory interest has a remunerative function, as it represents the remuneration due in return for the advantage arising from the availability of a sum, which pertains to the creditor.
- (IT.8) Finally, the case-law recognizes the existence of a third category, the equivalent interest, which is to be paid in case of loans and of awarded and payable sums.

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<sup>508</sup> Cf., *ex multis*, Supreme Civil Court, Judgment n. 4642 of 18 August 1982.

**1.2. When, and under what conditions, is interest payable at all? Does this depend on whether the claim is brought in tort, breach of contract or (where applicable) restitution/unjust enrichment?**

(IT.9) Within the Italian judicial system, in proceedings concerning damage claims resulting from infringements of competition law (i.e. in proceedings concerning non-contractual liability), compensatory interest on damages awarded to the plaintiff accrues from the date the harm occurred.

**1.3. Is payment of interest compulsory or at the discretion of the court?**

(IT.10) The allocation of compensatory interest is compulsory, as it is considered to be part of the compensation for the damage suffered; thus, the judge can award it *ex officio* and there is no need for the claimant to specifically ask for its payment (see below).

**1.4. What is said to be the purpose of the interest payment?**

(IT.11) The compensatory interest serves the purpose of compensating the lost opportunity, for the injured party, to have the capital at her disposal.

**1.5. What is the legal basis for the payment of interest (statutes, contractual agreements, case-law, soft law guidance)?**

(IT.12) It follows from Art. 1223<sup>509</sup> and 2043<sup>510</sup> of the Italian Civil Code that the damages arising from an infringement of competition law (that is, from an unlawful act, which leads to the application of Italian tort law) have to be fully compensated, which includes both the actual loss suffered (*damnum emergens*) and the loss of profits (*lucrum cessans*).

(IT.13) Starting from these statutory provisions, a copious case-law has better clarified that the loss of profits can be awarded also in the form of compensatory interest. Hereafter, a list of meaningful case-law on the subject is reported, with a brief description of the relevant point of law clarified by the courts.

- i. In its judgment n. 13666, of 17 September 2003, the Supreme Civil Court (First Chamber) affirmed that, in case of tort liability, the generic claim for damage compensation is to be considered as including the equivalent value of both the loss suffered and the damage caused by the lack of availability of the lost assets, for a period of time running from the occurrence of the harm until the date the judgment is issued. Therefore, the second component of the damage (*lucrum cessans*) can be granted *ex officio* by the judge, even in the absence of an *ad hoc* request.
- ii. In its judgment n. 883, of 25 January 2002, the Supreme Civil Court (Third Chamber) clarified that, in case of tort liability, when establishing the sum to be awarded to the injured party as compensation for the damage suffered, the court shall consider not only the monetary revaluation (which has the function of restoring the asset situation of the injured person before the perpetration of the tort, i.e. *damnum emergens*), but also the

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<sup>509</sup> Art. 1223 of the Italian Civil Code is entitled “*Compensation for damages*” and reads as follows: “*Compensation for damages arising from non-performance or delay shall include the loss sustained by the creditor and the lost profits insofar as they are a direct and immediate consequence of the non-performance or delay*”.

<sup>510</sup> Art. 2043 of the Italian Civil Code is entitled “*Compensation for unlawful acts*” and reads as follows: “*Any intentional or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages*”.

financial loss (*lucrum cessans*) suffered because of the lost opportunity to have the sum, due as compensation, at her disposal (sum that, if timely paid, could have been used to obtain a financial benefit). If such financial loss is awarded by means of interest, it has to be calculated either on the original sum as yearly revaluated, or on the original sum revaluated on the basis of an average index, starting from the day when the damage occurred.

- iii. In its judgment n. 11781, of 6 August 2002, the Supreme Civil Court (Third Chamber) recalled that, on the sum due as compensation for damage the interest has to be attributed also *ex officio*, as it integrates a component of the damage, which derives from the same generating fact and thus it does not have autonomous grounds with respect to the main obligation it is ancillary to.
- iv. In its judgment n. 10825, of 11 May 2007, the Supreme Civil Court (Third Chamber) established that, in case of a non-monetary obligation (like one arising from tort), the interest for late payment constitutes an implicit component of the claim, and thus, not only is the claimant entitled to it even without an explicit request, but the interest is due also in the absence of a rigorous proof of the loss of profit, as this proof can be provided by the party and accepted by the judge by resorting to presumptive and equitable criteria, after the evaluation of the specific circumstances of the case.
- v. In its judgment n. 9515, of 20 April 2007, the Supreme Civil Court (Third Chamber) established that when evaluating the damage on equitable basis, the judge can absorb in a single sum the main performance, the interest and the monetary revaluation providing that the conditions of Art. 1226<sup>511</sup> of the Italian Civil Code are complied with for all these components. This being the case, the judge shall specify which items are included in the total sum, but not also which part of it is to be attributed to each of them.

**1.6. What are the procedures for the party seeking to receive interest on the damages paid? (for example, does the claimant have to make a separate plea for the interest payments and if so, what information and evidence must be supplied?)**

- (IT.14) In order to receive interest on the damages paid, the party does not necessarily have to make a separate plea. As mentioned, in case of absence of a specific plea, the interest can be granted *ex officio* by the judge.

## **Section II. Calculation of Interest**

**2.1. What is the rate of interest that is set? How is it arrived at? Are there statutes?**

- (IT.15) Art. 1284<sup>512</sup> of the Italian Civil Code dictates the proceedings for setting the statutory rate of the interest. The current version of the first paragraph of the article establishes that the rate can

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<sup>511</sup> Art. 1226 of the Italian Civil Code is entitled “*Equitable measure of damages*” and reads as follows: “*If damages cannot be proved in their exact amount, they are equitably calculated by the court*”.

<sup>512</sup> Art. 1284 of the Italian Civil Code is entitled “*Interest rate*” and reads as follows: “*The rate of legal interest is determined at the rate of [5% on an annual basis]. The Minister of Treasury, through a decree published in the Official Gazette of the Italian Republic before December 15 of the year preceding that for which the rate refers, may change the measure yearly, based on the average annual gross yield of government bonds for a period not exceeding twelve months, and considering the inflation's rate reported during the year. If before December 15 a new measure of the rate is not determined, this remains unchanged for the following year. The same rate is applicable to the conventional interests, if*



be changed every year by the Ministry of Treasury (currently, Ministry of Economy and Finance) with a decree to be published in the Italian Official Journal. The decree has to be issued before the 15<sup>th</sup> December of the year, and the rate will be applicable starting from the 1<sup>st</sup> January of the following year. For the year 2015, the Ministry of Economy and Finance has set the interest rate to 0.50%.<sup>513</sup>

- (IT.16) Art. 1284 of the Italian Civil Code has been modified a number of times. In its first version, para. 1 fixed directly the statutory rate at 5.00%. With a modification introduced by Art. 1 of Law n. 353 of 26 November 1990, starting from 16 December 1990 the rate was increased to 10.00%. Finally, Art. 2, para. 185, of Law n. 662 of 23 December 1996 brought the statutory rate back to 5.00% starting from the 1 January 1997, and designed the currently applicable system of setting the rate.
- (IT.17) If the claimant believes to have suffered damage higher than the one corresponding to the compensatory interest at the statutory rate, he/she can ask for the compensatory interest to be calculated at a higher rate. However, the award of the interest at a higher rate is subject to the claimant's capability of providing evidences of the higher damages suffered.<sup>514</sup>

**2.2. Is interest simple or compound? If the interest is neither simple nor compound as defined above, please elaborate.**

- (IT.18) The compensatory interest is simple<sup>515</sup>, therefore the claimant cannot ask for interest on interest.
- (IT.19) However, a clarification is needed here. Consistent case-law has explained that the judgment which awards damages for an unlawful act creates a monetary obligation on the debtor. In other words, when the judgment is issued the obligation for which compensation is awarded, which originally was non-monetary, is converted into monetary. As a consequence, if the debtor does not pay the sum when it falls due, the creditor is entitled *ipso jure* to the interest upon that sum from the time when payment is due.<sup>516</sup> This interest accrues also on the compensatory interest, which forms part of the total amount originally awarded by the court.

(Contd.) \_\_\_\_\_

*parties have not established a different measure. Interests fixed at a rate superior to the statutory one have to be determined in written; otherwise the statutory rate is applicable”.*

<sup>513</sup> Ministry of Economy and Finance, Decree n. 14A09712 of 11 December 2014, published in the Italian Official Journal n. 290 of 15 December 2014, available online at <http://www.gazzettaufficiale.it/eli/id/2014/12/15/14A09712/sg>.

<sup>514</sup> Cf., *ex multis*: Supreme Civil Court (United Chambers), Judgment n. 1712 of 17 February 1995; Supreme Civil Court (Third Chamber), Judgment n. 3871 of 26 February 2004; Supreme Civil Court (Third Chamber), Judgment n. 4242 of 24 March 2003; Supreme Civil Court (Third Chamber), Judgment n. 6347 of 19 March 2014. However, the author is not aware of any cases where the courts awarded compensatory interest at a rate higher than the statutory one.

<sup>515</sup> The simple interest is the most common in Italy; in fact, Art. 1283 of the Italian Civil Code limits the possibility to award compound interest (that is, the interest that accrues on the interest) to a few cases only, and namely: (i) if there is a specific judicial claim for it and subject to the condition that, at the time of this claim, the principal interests are payable and the debtor is late in payment; (ii) if the compound interest is foreseen by a specific agreement the parties entered into after the principal interest expired. In both cases, the interest shall be due for a period of more than six months. In addition to that, Art. 1283 contains a closing clause which establishes that the compound interest is also due in cases of normative practices allowing it.

<sup>516</sup> The obligation stems from Art. 1282, para. 1, of the Italian Civil Code, which is entitled “*Interest in the pecuniary obligations*” and reads as follows: “*The awarded and payable pecuniary claims yield interest ipso jure, unless otherwise determined by the law or by the credit instrument*”.

(IT.20) The reason behind this is that the compensatory interest constitutes a component of the overall debt and not an autonomous debt; therefore, Art. 1283 of the Italian Civil Code on compound interest is not applicable.<sup>517</sup>

**2.3. What is the time for which interest is calculated? When does interest start to accrue, when does the accrual of interest end? Are there any situations where the action of the plaintiff, for example delay on his part, serves to change the time for which interest is calculated? Are there provisions for suspension of the accrual of interest?**

(IT.21) The compensatory interest is calculated from the time the harm occurred until the judgment awarding it is issued. Thus, the starting point for the accrual of the interest is the date of the occurrence of the harm, while the accrual ends the day the compensation is granted. If the payment is not made timely, the interest for delay starts accruing as from the day the judgment is issued until the full payment.

(IT.22) There are no situations where the action of the plaintiff serves to change the time for which the interest is calculated, nor are there provisions for the suspension of the accrual of the interest.

**2.4. Are there any specific provisions if payment is requested in a different currency than that in the state where the lawsuit is brought? (e.g. a Swedish company claims for damages resulting from an EU-wide cartel against a German cartel member in Germany. Can the court award only EUR or also Swedish Krona?)**

(IT.23) The Italian Civil Code does not contain any specific provision concerning payments requested in a different currency than the Euro; in any case, the court awards payments in Euro only.<sup>518</sup>

**2.5. As damage claims for infringements of EU competition rules often pertain to long-running infringements, please include all applicable interest rates and the date the rate came into force from 1 January 1985 until today. Unless impossible due to national peculiarities, the rates should be listed in a two column table, containing the rate and the date it came into force. This should be accompanied by a legal retrospective that sets out any other changes to the relevant interest regime (e.g. the time interest starts to run etc.) which occurred over this period, in order to allow a determination of which rules applied at a given point in time between 1 January 1985 and today.**

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<sup>517</sup> Cf., *ex multis*, Supreme Civil Court (Third Chamber), Judgment n. 13508 of 14 December 1991.

<sup>518</sup> In its judgment n. 9810, of 9 October 1997, the Supreme Civil Court (Third Chamber) clarified that, the pecuniary equivalent of the damage is the expression of a figure, and therefore it is not subject to fluctuation due to the vicissitudes of the exchange rate between national and foreign currencies during the period of delay in the payment (and during the proceedings). In other words, the pecuniary equivalent represents, by definition, a value which is indifferent to any subsequent variation, because it refers to an instantaneous reduction of assets (that is, a diminution that verified the moment the damage occurred). In the case at stake, the Supreme Civil Court dealt with a batch of goods, which was brought by the depositor in a foreign currency and then was lost by the depositary. The Court stated that the compensation of the damage in national currency had to be linked to the exchange rate at the day when the damage occurred, that is the day when the batch was lost. Due to the principle of full compensation, this sum, continued the Court, could then be adjusted to take into account the monetary devaluation eventually occurred to the national currency until the moment when the decision was issued.

Table 1 - Interest Rates

Date	Rate
21/04/1942	5.00%
16/12/1990	10.00%
01/01/1997	5.00%
01/01/1999	2.50%
01/01/2001	3.50%
01/01/2002	3.00%
01/01/2004	2.50%
01/01/2008	3.00%
01/01/2010	1.00%
01/01/2011	1.50%
01/01/2012	2.50%
01/01/2014	1.00%
01/01/2015	0.50%

For a legal retrospective concerning any other changes to the relevant interest regime, see above (question 2.1).

**2.6. Please identify an official, reliable, publicly available source that publishes the pertinent legal interest rates as they change.**

(IT.24) As said, the interest rate can be modified every year by the Ministry of Economy and Finance by means of a decree. All decrees are published in the Italian Official Journal, which can be freely consulted online at <http://www.gazzettaufficiale.it>. There is no other publicly available official source that publishes the pertinent legal interest rates as they change.

**2.7. If interest rates change on a fixed schedule, please indicate the schedule.**

(IT.25) See above (questions 2.1. and 2.5).

**2.8. If part of the debt / the damage is being paid, how is interest calculated following that payment? In particular, do partial payments first cover interest or the principal amount? Is there any provision or legal practice similar to Art. 86(3)(2) of the rules of application of Regulation 966/2012 on the financial rules applicable to the general budget of the Union where it is stated that “Any partial payments shall first cover the interest”?**

(IT.26) It follows from Art. 1194 of the Italian Civil Code<sup>519</sup> that, if partial payment is made, it first covers interest and only afterwards the principal amount. A different solution is possible only with the consensus of the debtor.

<sup>519</sup> Art. 1194 of the Italian Civil Code is entitled “Attribution of payment to the interest” and reads as follows: “The debtor cannot attribute payment to the principal amount, rather than to the interest and other expenses, without the creditor’s consensus. The payment made for the principal amount and to the interest is to be attributed to the interest first”. It must be noted that Art. 1094 is applicable to monetary obligations only; therefore, it is applicable in cases of damages claims for infringement of competition law rules only after the judgment (which, as said, transform the debtor’s obligation into a monetary one) has been issued.

- (IT.27) A clarification is needed here. As specified above (see questions 1.4 and 1.5), in case of damages claims for infringement of competition law rules, the compensatory interest is a way to compensate the loss of profits; this implies that, once the judgment awarding the compensation of damages is issued, such interest constitutes a component of the overall sum due. Therefore, if the partial payment is made without any delay, it will be attributed to the total sum awarded by the judge, which cannot be divided anymore between principal amount and interest, but needs to be considered as a unicum. However, if the payment is made with delay, then the interest for late payment accrues from the date the judgment is issued until the date the payment is made, and the latter will be first attributed to the interest, and only afterwards to the principal amount.

- 2.9. Please calculate interest in the following hypothetical case. All dates are given in the format dd.mm.yyyy. All amounts are stated without specifying the currency to abstract from implications of the introduction of the common Euro currency. Assume that the claims have not been time barred. Assume that a national court in the Member State on which you are reporting has jurisdiction to rule on the case. Assume that the cartelists are jointly liable for the damage caused by the cartel. If results differ materially depending on whether accrual of interest is based purely on national law or made in compliance with the EU principle of full compensation, provide both calculations.**

**There was a long running pan-European cartel for a product that materially affected trade between Member States. The cartel lasted from the beginning of 1993 until the dawn raids (unannounced inspections) of the European Commission on 02.02.2009.**

**On 30.11.2010, a longtime customer of the cartel, who bought the cartelised product in the Member State on which you are reporting, brings a claim for damages against three cartelists (A, B, and C). All of the three defendants have their seat in the Member State on which you are reporting. The customer only bought the cartelised product of the cartelists A and B. In the writ, the claimant specifies the damages caused by the cartel and the date on which the respective damage occurred. The claimant also specifically requests that interest be paid on the damages. The damages (always = 100) and respective dates are set out in Table 2 below. Should a subjective rate be of relevance, you will find the ROI (Return On Investment) rates of the claimant and the three defendants in Table 3 below. You will also find the average interest rate that the claimant had to pay on credit taken out in that year (claimant's average refinancing rate).**

**On 26.11.2013 a court renders a final judgment, ordering the defendant(s) to pay damages and interest. The defendants take until 12.02.2014 to pay. Please specify the total amount the jointly liable defendants have to pay on 12.02.2014 in order to relinquish their debt towards the claimant.**

Table 2 - Damages Amounts and Dates

Date	Interest
15/11/1993	100
17/09/1996	100
22/02/2006	100
12/08/2008	100

Table 3 - Refinance and Return on Investment Rates

Year	Claimant's Refinance Rate	Claimant's Annual ROI	Defendant's A Annual ROI	Defendant's B Annual ROI	Defendant's C Annual ROI
1993	6.00%	5.50%	4.00%	4.00%	3.00%
1994	6.00%	9.80%	4.00%	4.00%	4.00%
1995	6.00%	9.50%	4.00%	4.00%	5.00%
1996	6.00%	1.00%	0.00%	0.00%	0.00%
1997	8.00%	-3.80%	1.00%	1.00%	3.00%
1998	8.00%	1.10%	4.00%	4.00%	5.00%
1999	8.00%	2.80%	1.00%	1.00%	3.00%
2000	8.00%	1.10%	-2.00%	-1.00%	0.00%
2001	8.00%	4.51%	2.00%	2.00%	3.00%
2002	8.00%	5.30%	4.00%	4.00%	5.00%
2003	8.00%	8.21%	9.00%	9.00%	9.00%
2004	7.00%	9.00%	3.00%	3.00%	2.00%
2005	7.00%	10.00%	1.00%	1.00%	1.00%
2006	7.00%	6.00%	1.00%	1.00%	1.00%
2007	5.00%	-5.00%	4.00%	4.00%	2.00%
2008	5.00%	-7.00%	-1.00%	0.00%	0.00%
2009	5.00%	-5.00%	2.00%	2.00%	4.00%
2010	5.00%	-3.00%	4.00%	4.00%	4.00%
2011	5.00%	-2.70%	4.00%	4.00%	2.00%
2012	5.00%	1.61%	-2.00%	-1.00%	0.00%
2013	5.00%	4.40%	8.00%	8.00%	7.00%
2014	5.00%	1.41%	-4.00%	-3.00%	-1.00%

(IT.28) In the given hypothetical scenario, the compensatory interest will accrue from 15 November 1993 until 26 November 2013, and will be calculated as shown in the tables below. The compensatory interest was calculated on the sum (i.e. the damage amount) as monthly revaluated. In order to obtain monthly monetary revaluation coefficients, the monthly consumer price index provided by the ISTAT (Italian National Institute of Statistics, available online at <http://rivaluta.istat.it>) were converted to coefficients. This was done according to the formula provided in the guidelines for monetary revaluation (available online at [http://rivaluta.istat.it/Rivaluta/doc/NM\\_variazioni\\_coefficienti.pdf](http://rivaluta.istat.it/Rivaluta/doc/NM_variazioni_coefficienti.pdf)). As stipulated by the guidelines, the monthly monetary revaluation coefficients have been rounded to three decimal places.

(IT.29) The guidelines do not apply to the calculation of the interest part and hence no such rounding was applied. Calculations were done with a precision of more than ten decimal places. For ease of presentation however, the tables below show the capital and the accrued interest rounded to two decimal places (whole cents). All calculations are based on a determination of the exact part of the month and of the year matured, taking account of leap years. A more detailed calculation table is provided in the Appendix (IT).

## Damage 1

From	To	Revaluated Amount	Interest Rate	Total Days	Interest
15/11/1993	15/11/1994	104.02	10.00%	365	10.40
15/11/1994	15/11/1995	110.10	10.00%	365	11.01
15/11/1995	17/09/1996	112.85	10.00%	307	9.47
Total Revaluation (D.1)					<b>12.85</b>
Total Interest (D.1)					<b>30.88</b>
Total Revaluated Amount (D.1)					<b>112.85</b>

## Damage 2

From	To	Revaluated Amount	Interest Rate	Total Days	Interest
17/09/1996	31/12/1996	214.20	10.00%	105	6.14
01/01/1997	17/09/1997	216.16	5.00%	260	7.70
17/09/1997	17/09/1998	220.40	5.00%	365	11.02
17/09/1998	31/12/1998	221.15	5.00%	105	3.18
01/01/1999	17/09/1999	224.42	2.50%	260	4.00
17/09/1999	17/09/2000	230.89	2.50%	366	5.77
17/09/2000	31/12/2000	232.94	2.50%	105	1.67
01/01/2001	17/09/2001	237.06	3.50%	260	5.91
17/09/2001	31/12/2001	238.59	3.50%	105	2.40
01/01/2002	17/09/2002	243.68	3.00%	260	5.21
17/09/2002	17/09/2003	250.09	3.00%	365	7.50
17/09/2003	31/12/2003	251.06	3.00%	105	2.17
01/01/2004	17/09/2004	254.85	2.50%	261	4.56
17/09/2004	17/09/2005	259.73	2.50%	365	6.49
17/09/2005	22/02/2006	261.81	2.50%	158	2.83
Total Revaluation (D.2)					<b>48.96</b>
Total Interest (D.2)					<b>76.54</b>
Total Revaluated Amount (D.1 - D.2)					<b>261.81</b>

## Damage 3

From	To	Revaluated Amount	Interest Rate	Total Days	Interest
22/02/2006	22/02/2007	367.28	2.50%	365	9.18
22/02/2007	31/12/2007	376.34	2.50%	312	8.04
01/01/2008	22/02/2008	378.05	3.00%	53	1.64
22/02/2008	12/08/2008	386.00	3.00%	172	5.44
Total Revaluation (D.3)					<b>24.19</b>
Total Interest (D.3)					<b>24.31</b>
Total Revaluated Amount (D.1 - D.3)					<b>386.00</b>

## Damage 4

From	To	Revaluated Amount	Interest Rate	Total Days	Interest
12/08/2008	12/08/2009	486.07	3.00%	365	14.58
12/08/2009	31/12/2009	487.26	3.00%	141	5.65
01/01/2010	12/08/2010	494.01	1.00%	224	3.03
12/08/2010	31/12/2010	496.59	1.00%	141	1.92
01/01/2011	12/08/2011	507.69	1.50%	224	4.67
12/08/2011	31/12/2011	512.70	1.50%	141	2.97
01/01/2012	12/08/2012	523.53	2.50%	225	8.07
12/08/2012	12/08/2013	530.16	2.50%	365	13.25
12/08/2013	26/11/2013	527.43	2.50%	106	3.83
Total Revaluation (D.4)					<b>41.43</b>
Total Interest (D.4)					<b>57.95</b>
Total Revaluated Amount (D.1 - D.4)					<b>527.43</b>

(IT.30) The total amount of compensatory interest to be awarded is thus 189.68 (30.88 + 76.54 + 24.31 + 57.95). Therefore, the total sum awarded by the judge should be 527.43 (*damnum emergens* as yearly revaluated) plus 189.68 (*lucrum cessans*). On this sum, interest for late payment is to be calculated from the day the judgment is issued until the day the payment is made. Such interest is calculated as follows:

From	To	Amount	Interest Rate	Total Days	Interest
26/11/2013	31/12/2013	717.11	2.50%	35	1.72
01/09/2008	30/09/2008	717.11	1.00%	43	0.84

As a conclusion, the overall sum due by the debtor(s) on 12 February 2014 is 719.68.

### Section III. Procedural Aspects

#### 3.1. Does the judge award interest *ex officio* or does the claimant have to request it?

(IT.31) The judge awards interest *ex officio* (see above, question 1.3).

#### 3.2. Can the judge award a higher interest amount than requested by the claimant or does the principle of *ne ultra petita* apply?

(IT.32) If the claimant specifies the exact amount of the interest he claims, then the judge cannot award a higher interest amount; in fact, in this case the principle of *ne ultra petita* applies.

#### 3.3. Can the judge estimate interest or does interest always have to be calculated?

(IT.33) When the judge considers it appropriate to do so (usually, when it is too difficult or impossible to calculate the exact amount of the damage caused by the infringement), he/she can establish the overall sum to be awarded, comprehensive of both the *damnum emergens* and the *lucrum cessans*, on equitable basis. Apart from this special case, the interest has always to be

calculated. Nevertheless, the Italian case-law does not appear consistent in the way judges calculate and/or give indications in order for the parties to calculate the compensatory interest. Sometime judges indicate the starting day for accrual, other the interest rate, other they simply state that the compensatory interest is to be awarded, but no indication on calculation is provided. Therefore, in the majority of cases, the calculation exercise is left to the parties. However, it must be noted that, if the judge does not specify how the interest has to be calculated, the general principles on interest apply: (i) in case of non-contractual liability, the interest accrues from the day the damage has occurred; (ii) unless differently specified, the interest rate is the one established under Art. 1284 of the Italian Civil Code.

**3.4. If the claimant changes the request regarding the interest, is this regarded as an amendment of the pleadings? Is this only possible until a certain stage into the proceedings and precluded later on or can the claimant make such changes without negative procedural consequences at any time up to the judgment?**

- (IT.34) As long as the change of the request regarding the interest can be considered as a simple clarification of the *petitum*, and not an amendment of the same, it can be made until the third pleading that the claimant is allowed submit following the first hearing of the Italian civil proceeding before courts.<sup>520</sup> After that, any modification is to be considered inadmissible, and the inadmissibility can be established by the judge *ex officio*.

**Section IV. Specific Instances**

**4.1. Identify any cases relating to damages claims for infringements of competition law and explain how interest was calculated. In writing these summaries, provide all relevant information about how interest was calculated, so that this information can be passed on to another country reporter who can try and estimate how interest would be calculated in another jurisdiction.**

- (IT.35) In Italy, a massive number of follow-on actions has been brought to court against the automotive insurers sanctioned by the Italian Competition Authority (Autorità Garante della Concorrenza e del Mercato, hereinafter ICA) in the year 2000, for a violation of Art. 2 of the Italian Competition Act. More specifically, the ICA, in its decision n. 8546 of 20 July 2000<sup>521</sup>, established that the companies had put in place, from 1994 until 2000, an unlawful exchange of sensitive information, which in turn had caused an average inflation of 20% on the premiums paid by the final customers.
- (IT.36) According to public data, thousands of individual actions have been brought by customers, but only a limited number of them have received compensation. In the majority of these cases, the awarded damage has been calculated as a percentage of the premiums paid by the plaintiffs in the relevant period, and the courts have added to this sum the monetary revaluation and the compensatory interest accruing from the date the premiums were paid until the plaintiff's satisfaction. However, sometimes, the courts have followed different paths concerning

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<sup>520</sup> Art. 183(3) of the Italian Code of Civil Procedure. This article establishes that, during the first hearing of the case, the judge, following a request made by one or both of the parties, is obliged to grant a term for the submission of three pleadings containing clarifications or corrections of the original claims already presented. The three pleadings, that have to be submitted at a distance, respectively, of 30, 30 and 20 days, and must have the content specified in the same article.

<sup>521</sup> The decision, in Italian language, is available online at <http://www.agcm.it/component/domino/open/41256297003874BD/9580ABD365B16616C12569420032D002.html>



interest<sup>522</sup>. Some of the relevant case-law is hereby listed (please note that, for the reason illustrated in the preliminary remarks, this is not a full list):

SCC, Third Chamber, Judgments n. 17971 and n. 17972, of 14 August 2014 (on appeals against Court of Appeal of Salerno, Judgment n. 511 of 13 September 2007 and Judgment n. 930 of 20 December 2007, respectively)	The Court of Appeal of Salerno condemned the insurance companies to pay to each claimant the sum equivalent to the 20% of the obligatory civil liability (RCA) premium paid by each of them for the respective relevant periods. In all cases, the Court added to this sum the monetary revaluation and the legal interest. The companies appealed both judgments but the Supreme Civil Court upheld them rejecting all arguments brought by the appellants (none of which concerned the payment of compensatory interest).
SCC, First Chamber, Judgments n. 17998 and n. 17999, of 14 August 2014 (on appeals against Court of Appeal of Salerno, Judgment n. 267 of 6 May 2007 and Judgment n. 434 of 27 June 2007, respectively)	
SCC, First Chamber, Judgments n. 12186, of 30 May 2014, and n. 11904, of 28 May 2014 (on appeals brought against Court of Appeal of Lecce, Judgments n. 436 of 19 June 2007 and n. 431 of 16 June 2007, respectively)	The Court of Appeal of Lecce condemned the insurer to pay to each plaintiff the sum equivalent to the 15% of the RCA premiums paid by each of them during the respective relevant periods. In both cases, the Court added to this sum the monetary revaluation and the compensatory interest. The insurer appealed both judgments but the Supreme Civil Court upheld them rejecting all arguments brought by the appellant (none of which concerned the payment of compensatory interest).
SCC, First Chamber, Judgments n. 13095, n. 13096 and n. 13097, of 27 May 2013 (on the appeals brought against Court of Appeal of Naples, Judgments n. 1926 of 9 June 2006, n. 2133 of 23 June 2006, n. 2267 of 30 June 2006, respectively)	The Court fixed the amount to be paid based on equitable principles, establishing that it corresponded to the difference between the premium that was actually paid by each claimant and the one that would have been paid absent the illicit practice. The Court clarified that this sum had to be revaluated and that legal interest had to be added.
SCC, Third Chamber, Judgment n. 13667, of 30 May 2013 (confirming the Court of Appeal of Salerno, Judgment n. 1407, of 14 January 2009)	The Court condemned SARA Assicurazioni to pay to the claimant the sum of 49.82 EUR, plus monetary revaluation and the compensatory interest to be calculated on the sum progressively revaluated.
SCC, Judgment n. 12551 of 22 May 2013 (partially confirming Court of Appeal of Naples, Judgment n. 578, of 24 February 2006, and deciding on the merit)	The SCC confirmed the amount fixed by the Court of Appeal of Naples, that is 500 EUR (sum revaluated) plus the legal interest from the day of the claim.

<sup>522</sup> In a few cases, courts have even defined the insurance companies' liability as contractual, instead of non-contractual. In these cases, the interest was deemed to accrue from the date the debtor received formal notice. Cf., for example, Giudice di Pace of Rome, Judgment of 24 February 2004.

Court of Appeal of Naples, Judgment of 15 July 2008	The Judge condemned the insurance company to pay a sum equal to the 20% of the premiums paid by the plaintiff during the relevant period. To this sum, the Court added the monetary revaluation, the compensatory interest (even if not requested by the plaintiff) until the day of the judgment and the legal interest from the date of the judgment until the full payment.
Court of Appeal of Naples, Judgment of 11 July 2008	The Court condemned the insurance company to pay a sum equal to the 20% of the premiums paid by the plaintiff during the relevant periods. To this sum, the Court added the monetary revaluation and the legal interest to be calculated from the date of the claim.
Court of Appeal of Naples, Judgment of 7 April 2008	The Court condemned the insurance company to pay to the claimant the sum of 151 EUR, equal to half of the 20% of the premiums paid by the plaintiff during the relevant period. This sum, said the Court, had to be revaluated in accordance with the National Statistics Institute's indexes, and the compensatory interest had to be added, accruing on the sum yearly revaluated from the date of premiums were charged until the payment in full of the compensation.
Court of Appeal of Naples, Judgment of 9 November 2007	The Court condemned the insurance company to pay to the claimant the sum of 51.27 EUR, equal to the 20% of the premiums paid by the plaintiff during the relevant period. To this sum, that revaluated amounted to 90 EUR, the Court added the legal interest to be calculated from the date of the judgment until the payment in full.
Court of Appeal of Naples, Judgment of 26 October 2007	The Court condemned the insurance company to pay a sum equal to the 20% of the premiums paid by the plaintiff during the relevant period. To this amount, the Court added the monetary revaluation and the legal interest to be calculated from the date of the claim on the sum yearly revaluated.
Court of Appeal of Rome, Judgment of 22 October 2007	The Court condemned the insurance company to pay a sum equal to the 15% of the premiums paid by the plaintiff during the relevant period. The plaintiff did not ask for the monetary revaluation, but only for the compensatory interest. The Court, not following the dominant approach in the case-law, which states that monetary revaluation, being an element of the <i>restitutio in integrum</i> , should be awarded even in absence of the plaintiff's request, did not revaluated the sum, but simply awarded compensatory interest from the date the damage occurred. As the premiums had been paid between November 1997 and May 1999, and as it was not possible to establish in a precise way the amount of the compensation related to each payment, the Court considered equitable to establish an intermediate date for the starting of the interest's accrual, and fixed it at August 1998. The Court concluded awarding also the legal interest from the day of the decision until the payment in full.
Court of Appeal of Naples, Judgment of 7 July 2007	The Court condemned the insurance company to pay to the claimant the sum of 100 EUR, equal to the 20% of the premiums paid by the plaintiff during the relevant period plus monetary

	revaluation. To this sum, said the Court, the legal interest from the formal notice (which, for tort claims, corresponds ipso jure to the moment the damage occurred) had to be added, accruing on the sum as yearly revaluated.
Giudice di Pace of Catania, Judgment of 15 February 2005	The Judge condemned the insurance company to pay to the claimant the sum equal to the 20% of the premiums paid by the plaintiff during the relevant period. To this sum the Judge added the monetary revaluation and the legal interest to be calculated from the date of the judgment until the payment was made.
Giudice di Pace of Naples, Judgment of 26 January 2005	The Judge condemned the insurance company to pay a sum equal to the 12.6% of the premiums paid by the plaintiff during the relevant period. To this sum the Judge added the compensatory interest to be calculated at an average yearly rate of 5% from the date the first premium was charged until the payment in full of the compensation. The Judge excluded the monetary revaluation.
Giudice di Pace of Naples, Judgment of 15 January 2005	The Judge condemned the insurance company to pay a sum equal to the 20% of the premiums paid by the plaintiff during the relevant periods. To this sum the Judge added the legal interest to be calculated from the date each premium was charged until the date of the payment in full.

Apart from the case-law concerning the car insurance cartel, damages and compensatory interest have been awarded in a number of other actions for infringement of competition rules (here again, the list might not be complete for the reason mentioned at the beginning of the report).

i. *Brennercom S.p.A. v Telecom Italia S.p.A.*<sup>523</sup>

**Facts:** Brennercom (an Italian mobile network virtual operator) brought an action following the Italian Competition Authority's proceeding against Telecom, Wind and Vodafone, accused of having put in place discriminatory practices in violation of Art. 81 and 82 of TEEC (now Art. 101 and 102 of TFEU). More in particular, the companies were accused of applying to MNVOs higher terminal prices than those charged to their internal divisions. The ICA condemned Telecom and Wind to the payment of a sanction; as for Vodafone, the proceeding was closed with the acceptance of the commitments presented by the company<sup>524</sup>. Once the administrative fining procedure was closed, Brennercom initiated a civil action for damages.

**Judgment:** The total amount of the compensation was fixed at 433,000 EUR.

**Relevant point:** In order to calculate the damage suffered by Brennercom, the Judge appointed technical experts, who considered the damage to range between a minimum of 279,207 EUR and a maximum of 399,267 EUR, depending on the degree of substitutability. The Judge then explained that the rate used for the revaluation was chosen taking as a reference the financial activities that would have been performed by the average investor, and thus the technical experts referred to the three-year Italian Government Bond rate. Moreover, the Judge considered the compensatory interest to be included in the sum awarded, due to the criterion chosen for adjusting the "historic" amount to current monetary value; the Judge

<sup>523</sup> Tribunal of Milan, Judgment of 27 December 2013.

<sup>524</sup> Italian Competition Authority, Decision n. A357 of 2007.

concluded recalling that legal interest were deemed to accrue on this sum from the date the judgment was issued until full payment.

ii. *Teleunit S.p.A. v Vodafone Omnitel N.V. S.p.A.*<sup>525</sup>

**Facts:** Teleunit S.p.A. (an Italian mobile network virtual operator) brought a claim against Vodafone Omnitel N.V. S.p.A., an Italian telecom operator. This claim as well followed the ICA decision mentioned above<sup>526</sup>.

**Judgment:** the Judge condemned Vodafone to compensate Teleunit for the overcharges paid in 2002-2007, calculated by the Tribunal appointed expert in 220,750.87 EUR, which after revaluation amounted to 251,007.87 EUR.

**Relevant point:** the Tribunal established that compensatory interest at the statutory rate had to be awarded on the sum as yearly revaluated, and fixed the total amount of this interest at 33,795.37 EUR. In addition, the Tribunal declared that legal interest also accrued from the date of the decision until the full payment, but strangely enough it established that the interest had to be calculated on the 251,007.87 EUR and not on the total amount awarded (that is, the sum revaluated plus the compensatory interest).

iii. *OKCom S.p.A. v Telecom Italia S.p.A.*<sup>527</sup>

**Facts:** OKCom S.p.A. (a phone service provider) brought an action against Telecom Italian S.p.A. (the incumbent telephone operator). OKCom claimed that Telecom Italia had abused its dominant position violating Art. 81 and 82 of TEEC, and asked the Tribunal to prohibit Telecom Italia to continue with the abusive conducts and to order the company to compensate the harm suffered by OKCom as a consequence of these conducts.

**Judgment:** the Tribunal awarded damages for the actual loss suffered by OKCom when Telecom Italia put a margin squeeze in place on the wholesale market for the termination of phone calls on its own network. The loss was calculated as the difference between the wholesale tariffs paid by the plaintiff and the retail tariffs that the defendant offered to its retail clients during the period 2003-2005. The Tribunal refused to award loss of profit and harm to the claimant's reputation on the grounds that the claimant had not provided adequate evidence of such damages.

**Relevant point:** on the sum calculated as loss, revaluated, the Tribunal awarded compensatory interest from 31 December 2005 (that is from the moment the illicit conduct ended); however, the Tribunal refused to award the compensatory interest at a rate superior to the statutory one, declaring that OKCom had failed to demonstrate that, due to its specific financial conditions, the unavailability of the sum caused her a greater damage.

iv. *Agenzia del Territorio*<sup>528</sup>

**Facts:** Agenzia del Territorio (the Italian Agency entrusted with the maintenance of the national land registry) abusively imposed restrictions on the commercial utilisation of data by

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<sup>525</sup> Tribunal of Milan, Judgment of 1 October 2013.

<sup>526</sup> Italian Competition Authority, Decision n. A357 of 2007, *cit.*

<sup>527</sup> Tribunal of Milan, Judgment of 13 February 2013.

<sup>528</sup> Court of Appeal of Milan, Judgment of 4 April 2012.

several companies, which brought an action before the Court of Appeal for the compensation of the loss of profits suffered as a consequence of the abusive behaviour of the Agency.

**Judgment:** the Court calculated the damages on equitable basis, referring to the results of the appointed technical experts' opinion.

**Relevant point:** on the sum awarded to each claimant, the Court added the revaluation and the compensatory interest, at the statutory rate, to be calculated on the initial sum yearly revaluated. Finally, the Court recalled that legal interest accrued on the revaluated sums from the day of the judgment until the payment in full.

v. *International Broker*<sup>529</sup>

**Facts:** the main local oil refining companies aligned prices through participation in a joint venture for the production and distribution of bitumen. The local companies' behavior had been sanctioned by the ICA in 1996<sup>530</sup> and the Authority's decision had been confirmed by both the Administrative Tribunal of Lazio and the State Council. International Broker brought an action before the Court of Appeal for the compensation of the damages suffered as a consequence of the local companies' abusive behavior.

**Judgment:** the Court of Appeal awarded to International Broker the compensation of both the actual loss suffered and the loss of profits.

**Relevant point:** the Court awarded 13,789.39 EUR as *damnum emergens*, that revaluated amounted to 19,073.38 EUR; moreover, the Court established that legal interest was due on the average sum of 16,431.43 EUR from July 1994 (that is, from the moment the damage occurred) until the date of the judgment. In addition, the Court awarded the sum of 42,224.14 EUR as compensation of the *lucrum cessans* verified during the year 1994, which revaluated amounted to 58,404.43 EUR. Here as well, the Court established that legal interest was due on the average sum, fixed at 50,314,28 EUR, from July 1994 until the day of the judgment. The Court concluded that legal interest accrued on both revaluated sums (that is, 19,073.38 EUR and 58,404.43 EUR) from the day of the judgment until the payment in full.

vi. *AVIR S.p.A. v ENI S.p.A.*<sup>531</sup>

**Facts:** AVIR S.p.A. (a glass producer) brought a claim against ENI S.p.A., the Italian incumbent gas operator claiming that it has suffered damages from ENI's abusive behavior.

**Judgment:** the Court established that in 2002-2003 ENI had abused its dominant position on the Italian gas market by imposing unfair prices to AVIR, in violation of Art. 3 of the Italian Competition Act. It then condemned ENI to compensate AVIR for the damages caused. Following the opinion of the appointed technical experts, the Court awarded the total sum of 1,677,541.94 EUR, corresponding to the overcharges paid by AVIR for the eleven contracts concluded with ENI in the relevant period.

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<sup>529</sup> Court of Appeal of Rome, Judgment of 31 March 2008.

<sup>530</sup> Italian Competition Authority, Decision n. 3692 of 13 March 1996. Companies were sanctioned for the breach of Art. 2 of the Italian Competition Act.

<sup>531</sup> Court of Appeal of Milan, Judgment of 16 September 2006.

**Relevant point:** Strangely enough, the Court considered the compensatory obligation as a monetary one, therefore it excluded the revaluation and simply awarded legal interest accruing from the date each undue payment was made until the full payment.

vii. *Bluvacanze S.p.A.*<sup>532</sup>

**Facts:** the travel agency Bluvacanze S.p.A. brought an appeal against the tour operators I Viaggi del Ventaglio, Turisanda and Hotelplan Italia, claiming that they had put in place a cartel in violation of Art. 2 of the Italian Competition Act and asking for compensation of the damages suffered as a consequence of the cartel.

**Judgment:** the Court of Appeal of Milan established that, in 2001, the tour operators had boycotted Bluvacanze in retaliation for the aggressive discounts the agency offered to its clients by renouncing part of its commission. The Court awarded two heads of damages to Bluvacanze: the loss of profits derived from the supply interruption by the mentioned tour operators and the damage to reputation; the first one amounted to the revaluated sum of 184,494.49 EUR, the second to the revaluated sum of 50,000 EUR.

**Relevant point:** on the first sum, the Court awarded compensatory interest to be calculated on the sum as yearly revaluated from the 15 May 2001 until the payment in full.

viii. *Albacom S.p.A. v Telecom Italia S.p.A.*<sup>533</sup>

**Facts:** The plaintiff claimed that, in the period from the end of 1999 and for the entire 2000, Telecom Italia, abusing its dominant position in violation of Art. 3 of the Italian Competition Act, had prevented new potential competitors to enter the wholesale market for x-DSL and x-SDH technologies.

**Judgment:** the Court ruled in favor of Albacom, confirming the abuse and condemning Telecom Italia to compensate the damages, which were calculated referring to the market shares of the plaintiff before the exclusion and applying these shares to the revenues generated by Telecom Italia during the abuse.

**Relevant point:** the Court awarded the sum of 1,313,564.22 EUR, which revaluated amounted to 1,404,856.93 EUR, and added the compensatory interest accruing on the initial sum (1,313,564.22 EUR) yearly revaluated, from the end of 2000 (that is, from the date the damage occurred) until the day the decision was issued. The Court concluded that legal interest on the revaluated amount (1,404,856.93 EUR) was also due from the day of the decision until the payment in full<sup>534</sup>.

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<sup>532</sup> Court of Appeal of Milan, Judgment of 11 July 2003.

<sup>533</sup> Court of Appeal of Rome, Judgment of 20 January 2003.

<sup>534</sup> On a similar case, the Court of Appeal of Milan had already ruled on 24 December 1996, following the appeal brought by Telsystem S.p.A. against Telecom Italia S.p.A. There as well, the Court ascertained the abuse of dominant position put in place from January 1994 and January 1995 and condemned Telecom Italia to the compensation of the damages caused to Telsystem. Referring to the opinion of the technical experts, the Court established that damages amounted to 3,253,000,000 Italian Lire. The Court awarded the revaluation, but not the compensatory interest.

ix. **Valgrana**<sup>535</sup>

**Facts:** Valgrana, a producer of Grana Padano cheese, brought an action against the Consortium for the Protection of Grana Padano, the industry association Valgrana was a member of. The cheese producer asked for the compensation of the damages it suffered because of the illegitimate output limitation decisions adopted by the Consortium in the years 1995 and 1996.

**Judgment:** the Court condemned the Consortium to the payment of the compensation, calculated recurring to equitable criteria.

**Relevant point:** the Court finally awarded the sum of 1,446,079.30 EUR, plus revaluation and compensatory interest. In particular, the Court stated that the sum had to be revaluated, following ISTAT index, starting from December 1995 until the date of the judgment, and that the compensatory interest had to be calculated, for the same period, on the sum as yearly revaluated.

**4.2. Are the rules on the award of interest specific to the kinds of claim or general principles? Are there any specific approaches/rules that you can identify in national or EU competition cases, or in other cases where the claim is brought by business against business (B2B) and are there any specific approaches/rules in business versus consumer (B2C) cases?**

(IT.37) The Italian legal system does not provide for any specific rules concerning the award of interest in case of claims resulting from infringement of competition law. Thus, in these proceedings, the general principles on tort law are applicable.

**Section V. Evaluation, Interpretation in conformity with EU Law, and Intertemporal Aspect**

**5.1. How satisfactory are the rules on the calculation of interest perceived to be? In considering this question, identify any law reform proposals in the last 15 years or so, or any major judgments by the higher courts that call into question or change some of the issues pertaining to the award of damages. Please identify changes of relevant national law on interest that will come into force or are currently considered.**

(IT.38) The rules on the calculation of interest are perceived to be quite satisfactory. After the modification introduced by Law n. 662 of 23 December 1996 concerning the method for setting the statutory rate of the interest (see above, question 7), no law reform took place, nor there is any relevant national law on interest that will come in to force in the near future or any changes to relevant national law that is currently considered.

(IT.39) However, looking at the case-law, notwithstanding the fact that the milestone judgment on the interest was issued by the Supreme Civil Court in 1995<sup>536</sup> and then confirmed by numerous following judgments, there is still some inconsistency in the way courts award the compensatory interest. As a way of example, as seen above (question 15), sometimes courts awarded the interest from the date the harm has occurred, but others they fixed the starting date

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<sup>535</sup> Court of Appeal of Torino, Judgment of 7 February 2002.

<sup>536</sup> Supreme Civil Court (United Chambers), Judgment n. 1712 of 17 February 1995.

for accrual on the day the claim was brought. In addition, in a few cases the courts did not award the compensatory interest at all.

- 5.2. Assess the compliance of the national interest rules with the minimum standard prescribed by EU law set out above ('full compensation'). If national law does not grant full compensation, please try to identify an interpretation of national law that guarantees full compensation in conformity with European law. Given that the principle of full compensation is based on directly applicable EU law, please confirm that national courts have to apply it also in relation to past infringements of EU competition law (e.g. cartels starting in the 1990ies and ending in the 2000er years).**

(IT.40) Italian rules on compensatory interest seem to comply with the minimum standard prescribed by EU law. The second question does not fit the Italian situation, as the principle of full compensation is already established by national rules; therefore Italian courts have to apply it anyhow.

- 5.3. Regarding the secondary subject of investigation (interest on damages due to infringements of national competition law only), the proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union<sup>537</sup>, if adopted, would make the rules of European Law as outlined above applicable to infringements of national competition law. Art. 2 (Right to full compensation), para. 2 stipulates exactly those:**

*“Full compensation shall place anyone who has suffered harm in the position in which that person would have been had the infringement not been committed. It shall therefore include compensation for actual loss and for loss of profit, and payment of interest from the time the harm occurred until the compensation in respect of that harm has actually been paid”.*

**Would the right to full compensation as set out by Art. 2 of the proposed directive apply to interest calculation for damages in cases where only national competition law has been infringed and the damage occurred before the implementation of the directive came into force?**

(IT.41) As said above, the principle of full compensation is already established by Italian tort law, therefore it applies also in cases where only national competition law has been infringed and the damage occurred before the implementation of the directive came into force.

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<sup>537</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, 2013/0185 (COD), 11 June 2013.



**Appendix. Italy**

The compensatory interest was calculated on the sum (the damage amount) as monthly revaluated. In order to obtain monthly monetary revaluation coefficients, the monthly consumer price index provided by the ISTAT (Italian National Institute of Statistics, available online at <http://rivaluta.istat.it>) were converted to coefficients. This was done according to the formula provided in the guidelines for monetary revaluation (available online at [http://rivaluta.istat.it/Rivaluta/doc/NM\\_variazioni\\_coefficienti.pdf](http://rivaluta.istat.it/Rivaluta/doc/NM_variazioni_coefficienti.pdf)). As stipulated by the guidelines, the monthly monetary revaluation coefficients have been rounded to three decimal places. The guidelines do not apply to the calculation of the interest part and hence no such rounding was applied. Calculations were done with a precision of more than ten decimal places. For ease of presentation however, the table below shows the capital and the accrued interest rounded to two decimal places (whole cents). All calculations are based on a determination of the exact part of the month and of the year matured, taking account of leap years.

Damage 1

From	To	Amount	Revaluation Coefficient	Days in Month	Days Matured	Ratio	Revaluated Amount	Interest Rate	Total Days	Interest
<b>15/11/1993</b>	30/11/1993	<b>100.00</b>	1.005	30	15	0.500	100.25			
01/12/1993	31/12/1993	100.25	1.000	31	31	1.000	100.25			
01/01/1994	31/01/1994	100.25	1.006	31	31	1.000	100.85			
01/02/1994	28/02/1994	100.85	1.004	28	28	1.000	101.25			
01/03/1994	31/03/1994	101.25	1.002	31	31	1.000	101.46			
01/04/1994	30/04/1994	101.46	1.003	30	30	1.000	101.76			
01/05/1994	31/05/1994	101.76	1.004	31	31	1.000	102.17			
01/06/1994	30/06/1994	102.17	1.002	30	30	1.000	102.37			
01/07/1994	31/07/1994	102.37	1.003	31	31	1.000	102.68			
01/08/1994	31/08/1994	102.68	1.002	31	31	1.000	102.89			
01/09/1994	30/09/1994	102.89	1.003	30	30	1.000	103.19			
01/10/1994	31/10/1994	103.19	1.006	31	31	1.000	103.81			
01/11/1994	<b>15/11/1994</b>	103.81	1.004	30	15	0.500	<b>104.02</b>	<b>10.00%</b>	<b>365</b>	<b>10.40</b>
15/11/1994	30/11/1994	104.02	1.004	30	15	0.500	104.23			
01/12/1994	31/12/1994	104.23	1.004	31	31	1.000	104.65			
01/01/1995	31/01/1995	104.65	1.004	31	31	1.000	105.06			
01/02/1995	28/02/1995	105.06	1.008	28	28	1.000	105.90			
01/03/1995	31/03/1995	105.90	1.008	31	31	1.000	106.75			
01/04/1995	30/04/1995	106.75	1.005	30	30	1.000	107.29			
01/05/1995	31/05/1995	107.29	1.006	31	31	1.000	107.93			
01/06/1995	30/06/1995	107.93	1.005	30	30	1.000	108.47			
01/07/1995	31/07/1995	108.47	1.001	31	31	1.000	108.58			
01/08/1995	31/08/1995	108.58	1.003	31	31	1.000	108.90			
01/09/1995	30/09/1995	108.90	1.003	30	30	1.000	109.23			
01/10/1995	31/10/1995	109.23	1.005	31	31	1.000	109.78			
01/11/1995	<b>15/11/1995</b>	109.78	1.006	30	15	0.500	<b>110.10</b>	<b>10.00%</b>	<b>365</b>	<b>11.01</b>
15/11/1995	30/11/1995	110.10	1.006	30	15	0.500	110.43			
01/12/1995	31/12/1995	110.43	1.002	31	31	1.000	110.66			
01/01/1996	31/01/1996	110.66	1.001	31	31	1.000	110.77			
01/02/1996	29/02/1996	110.77	1.003	29	29	1.000	111.10			
01/03/1996	31/03/1996	111.10	1.003	31	31	1.000	111.43			
01/04/1996	30/04/1996	111.43	1.006	30	30	1.000	112.10			
01/05/1996	31/05/1996	112.10	1.004	31	31	1.000	112.55			
01/06/1996	30/06/1996	112.55	1.002	30	30	1.000	112.77			
01/07/1996	31/07/1996	112.77	0.998	31	31	1.000	112.55			
01/08/1996	31/08/1996	112.55	1.001	31	31	1.000	112.66			
01/09/1996	<b>17/09/1996</b>	112.66	1.003	30	17	0.567	<b>112.85</b>	<b>10.00%</b>	<b>307</b>	<b>9.47</b>
								Total Revaluation (D.1)		<b>12.85</b>
								Total Interest (D.1)		<b>30.88</b>

Total Revaluated Amount (D.1)	<b>112.85</b>
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## Damage 2

From	To	Amount	Revaluation Coefficient	Days in Month	Days Matured	Ratio	Revaluated Amount	Interest Rate	Total Days	Interest
17/09/1996	30/09/1996	212.85	1.003	30	13	0.433	213.13			
01/10/1996	31/10/1996	213.13	1.001	31	31	1.000	213.34			
01/11/1996	30/11/1996	213.34	1.003	30	30	1.000	213.98			
01/12/1996	<b>31/12/1996</b>	213.98	1.001	31	31	1.000	<b>214.20</b>	<b>10.00%</b>	<b>105</b>	<b>6.14</b>
01/01/1997	31/01/1997	214.20	1.002	31	31	1.000	214.62			
01/02/1997	28/02/1997	214.62	1.001	28	28	1.000	214.84			
01/03/1997	31/03/1997	214.84	1.001	31	31	1.000	215.05			
01/04/1997	30/04/1997	215.05	1.001	30	30	1.000	215.27			
01/05/1997	31/05/1997	215.27	1.003	31	31	1.000	215.91			
01/06/1997	30/06/1997	215.91	1.000	30	30	1.000	215.91			
01/07/1997	31/07/1997	215.91	1.000	31	31	1.000	215.91			
01/08/1997	31/08/1997	215.91	1.000	31	31	1.000	215.91			
01/09/1997	<b>17/09/1997</b>	215.91	1.002	30	17	0.567	<b>216.16</b>	<b>5.00%</b>	<b>260</b>	<b>7.70</b>
18/09/1997	30/09/1997	216.16	1.002	30	13	0.433	216.35			
01/10/1997	31/10/1997	216.35	1.003	31	31	1.000	217.00			
01/11/1997	30/11/1997	217.00	1.003	30	30	1.000	217.65			
01/12/1997	31/12/1997	217.65	1.000	31	31	1.000	217.65			
01/01/1998	31/01/1998	217.65	1.003	31	31	1.000	218.30			
01/02/1998	28/02/1998	218.30	1.003	28	28	1.000	218.95			
01/03/1998	31/03/1998	218.95	1.000	31	31	1.000	218.95			
01/04/1998	30/04/1998	218.95	1.002	30	30	1.000	219.39			
01/05/1998	31/05/1998	219.39	1.002	31	31	1.000	219.83			
01/06/1998	30/06/1998	219.83	1.001	30	30	1.000	220.05			
01/07/1998	31/07/1998	220.05	1.000	31	31	1.000	220.05			
01/08/1998	31/08/1998	220.05	1.001	31	31	1.000	220.27			
01/09/1998	<b>17/09/1998</b>	220.27	1.001	30	17	0.567	<b>220.40</b>	<b>5.00%</b>	<b>365</b>	<b>11.02</b>
18/09/1998	30/09/1998	220.40	1.001	30	13	0.433	220.49			
01/10/1998	31/10/1998	220.49	1.002	31	31	1.000	220.93			
01/11/1998	30/11/1998	220.93	1.001	30	30	1.000	221.15			
01/12/1998	<b>31/12/1998</b>	221.15	1.000	31	31	1.000	<b>221.15</b>	<b>5.00%</b>	<b>105</b>	<b>3.18</b>
01/01/1999	31/01/1999	221.15	1.001	31	31	1.000	221.37			
01/02/1999	28/02/1999	221.37	1.002	28	28	1.000	221.82			
01/03/1999	31/03/1999	221.82	1.002	31	31	1.000	222.26			
01/04/1999	30/04/1999	222.26	1.004	30	30	1.000	223.15			
01/05/1999	31/05/1999	223.15	1.002	31	31	1.000	223.60			
01/06/1999	30/06/1999	223.60	1.000	30	30	1.000	223.60			
01/07/1999	31/07/1999	223.60	1.002	31	31	1.000	224.04			
01/08/1999	31/08/1999	224.04	1.000	31	31	1.000	224.04			
01/09/1999	<b>17/09/1999</b>	224.04	1.003	30	17	0.567	<b>224.42</b>	<b>2.50%</b>	<b>260</b>	<b>4.00</b>
18/09/1999	30/09/1999	224.42	1.003	30	13	0.433	224.72			
01/10/1999	31/10/1999	224.72	1.002	31	31	1.000	225.16			
01/11/1999	30/11/1999	225.16	1.004	30	30	1.000	226.07			
01/12/1999	31/12/1999	226.07	1.001	31	31	1.000	226.29			
01/01/2000	31/01/2000	226.29	1.001	31	31	1.000	226.52			
01/02/2000	29/02/2000	226.52	1.005	29	29	1.000	227.65			
01/03/2000	31/03/2000	227.65	1.003	31	31	1.000	228.33			
01/04/2000	30/04/2000	228.33	1.001	30	30	1.000	228.56			
01/05/2000	31/05/2000	228.56	1.003	31	31	1.000	229.25			
01/06/2000	30/06/2000	229.25	1.004	30	30	1.000	230.16			
01/07/2000	31/07/2000	230.16	1.002	31	31	1.000	230.62			
01/08/2000	31/08/2000	230.62	1.000	31	31	1.000	230.62			
01/09/2000	<b>17/09/2000</b>	230.62	1.002	30	17	0.567	<b>230.89</b>	<b>2.50%</b>	<b>366</b>	<b>5.77</b>
18/09/2000	30/09/2000	230.89	1.002	30	13	0.433	231.09			

01/10/2000	31/10/2000	231.09	1.003	31	31	1.000	231.78			
01/11/2000	30/11/2000	231.78	1.004	30	30	1.000	232.71			
01/12/2000	<b>31/12/2000</b>	232.71	1.001	31	31	1.000	<b>232.94</b>	<b>2.50%</b>	<b>105</b>	<b>1.67</b>
01/01/2001	31/01/2001	232.94	1.004	31	31	1.000	233.87			
01/02/2001	28/02/2001	233.87	1.004	28	28	1.000	234.81			
01/03/2001	31/03/2001	234.81	1.001	31	31	1.000	235.04			
01/04/2001	30/04/2001	235.04	1.003	30	30	1.000	235.75			
01/05/2001	31/05/2001	235.75	1.003	31	31	1.000	236.45			
01/06/2001	30/06/2001	236.45	1.002	30	30	1.000	236.93			
01/07/2001	31/07/2001	236.93	1.000	31	31	1.000	236.93			
01/08/2001	31/08/2001	236.93	1.000	31	31	1.000	236.93			
01/09/2001	<b>17/09/2001</b>	236.93	1.001	30	17	0.567	<b>237.06</b>	<b>3.50%</b>	<b>260</b>	<b>5.91</b>
18/09/2001	30/09/2001	237.06	1.001	30	13	0.433	237.16			
01/10/2001	31/10/2001	237.16	1.003	31	31	1.000	237.87			
01/11/2001	30/11/2001	237.87	1.002	30	30	1.000	238.35			
01/12/2001	<b>31/12/2001</b>	238.35	1.001	31	31	1.000	<b>238.59</b>	<b>3.50%</b>	<b>105</b>	<b>2.40</b>
01/01/2002	31/01/2002	238.59	1.004	31	31	1.000	239.54			
01/02/2002	28/02/2002	239.54	1.003	28	28	1.000	240.26			
01/03/2002	31/03/2002	240.26	1.003	31	31	1.000	240.98			
01/04/2002	30/04/2002	240.98	1.003	30	30	1.000	241.71			
01/05/2002	31/05/2002	241.71	1.002	31	31	1.000	242.19			
01/06/2002	30/06/2002	242.19	1.002	30	30	1.000	242.67			
01/07/2002	31/07/2002	242.67	1.001	31	31	1.000	242.92			
01/08/2002	31/08/2002	242.92	1.002	31	31	1.000	243.40			
01/09/2002	<b>17/09/2002</b>	243.40	1.002	30	17	0.567	<b>243.68</b>	<b>3.00%</b>	<b>260</b>	<b>5.21</b>
18/09/2002	30/09/2002	243.68	1.002	30	13	0.433	243.89			
01/10/2002	31/10/2002	243.89	1.003	31	31	1.000	244.62			
01/11/2002	30/11/2002	244.62	1.003	30	30	1.000	245.35			
01/12/2002	31/12/2002	245.35	1.001	31	31	1.000	245.60			
01/01/2003	31/01/2003	245.60	1.004	31	31	1.000	246.58			
01/02/2003	28/02/2003	246.58	1.002	28	28	1.000	247.07			
01/03/2003	31/03/2003	247.07	1.003	31	31	1.000	247.82			
01/04/2003	30/04/2003	247.82	1.002	30	30	1.000	248.31			
01/05/2003	31/05/2003	248.31	1.001	31	31	1.000	248.56			
01/06/2003	30/06/2003	248.56	1.001	30	30	1.000	248.81			
01/07/2003	31/07/2003	248.81	1.002	31	31	1.000	249.31			
01/08/2003	31/08/2003	249.31	1.002	31	31	1.000	249.80			
01/09/2003	<b>17/09/2003</b>	249.80	1.002	30	17	0.567	<b>250.09</b>	<b>3.00%</b>	<b>365</b>	<b>7.50</b>
18/09/2003	30/09/2003	250.09	1.002	30	13	0.433	250.30			
01/10/2003	31/10/2003	250.30	1.001	31	31	1.000	250.55			
01/11/2003	30/11/2003	250.55	1.002	30	30	1.000	251.06			
01/12/2003	<b>31/12/2003</b>	251.06	1.000	31	31	1.000	<b>251.06</b>	<b>3.00%</b>	<b>105</b>	<b>2.17</b>
01/01/2004	31/01/2004	251.06	1.002	31	31	1.000	251.56			
01/02/2004	29/02/2004	251.56	1.003	29	29	1.000	252.31			
01/03/2004	31/03/2004	252.31	1.001	31	31	1.000	252.56			
01/04/2004	30/04/2004	252.56	1.002	30	30	1.000	253.07			
01/05/2004	31/05/2004	253.07	1.002	31	31	1.000	253.58			
01/06/2004	30/06/2004	253.58	1.002	30	30	1.000	254.08			
01/07/2004	31/07/2004	254.08	1.001	31	31	1.000	254.34			
01/08/2004	31/08/2004	254.34	1.002	31	31	1.000	254.85			
01/09/2004	<b>17/09/2004</b>	254.85	1.000	30	17	0.567	<b>254.85</b>	<b>2.50%</b>	<b>261</b>	<b>4.54</b>
18/09/2004	30/09/2004	254.85	1.000	30	13	0.433	254.85			
01/10/2004	31/10/2004	254.85	1.000	31	31	1.000	254.85			
01/11/2004	30/11/2004	254.85	1.002	30	30	1.000	255.36			
01/12/2004	31/12/2004	255.36	1.000	31	31	1.000	255.36			
01/01/2005	31/01/2005	255.36	1.000	31	31	1.000	255.36			
01/02/2005	28/02/2005	255.36	1.003	28	28	1.000	256.12			
01/03/2005	31/03/2005	256.12	1.002	31	31	1.000	256.63			
01/04/2005	30/04/2005	256.63	1.003	30	30	1.000	257.40			
01/05/2005	31/05/2005	257.40	1.002	31	31	1.000	257.92			

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01/06/2005	30/06/2005	257.92	1.002	30	30	1.000	258.43			
01/07/2005	31/07/2005	258.43	1.002	31	31	1.000	258.95			
01/08/2005	31/08/2005	258.95	1.002	31	31	1.000	259.47			
01/09/2005	<b>17/09/2005</b>	259.47	1.001	30	30	1.000	<b>259.73</b>	<b>2.50%</b>	<b>365</b>	<b>6.49</b>
18/09/2005	30/09/2005	259.73	1.001	30	13	0.433	259.84			
01/10/2005	31/10/2005	259.84	1.002	31	31	1.000	260.36			
01/11/2005	30/11/2005	260.36	1.000	30	30	1.000	260.36			
01/12/2005	31/12/2005	260.36	1.002	31	31	1.000	260.88			
01/01/2006	31/01/2006	260.88	1.002	31	31	1.000	261.40			
01/02/2006	<b>22/02/2006</b>	261.40	1.002	28	22	0.786	<b>261.81</b>	<b>2.50%</b>	<b>158</b>	<b>2.83</b>
								Total Revaluation (D.2)		<b>48.96</b>
								Total Interest (D.2)		<b>76.54</b>
								Total Revaluated Amount (D.1 - D.2)		<b>261.81</b>

Damage 3

From	To	Amount	Revaluation Coefficient	Days in Month	Days Matured	Ratio	Revaluated Amount	Interest Rate	Total Days	Interest
23/02/2006	28/02/2006	361.81	1.002	28	6	0.214	361.97			
01/03/2006	31/03/2006	361.97	1.002	31	31	1.000	362.69			
01/04/2006	30/04/2006	362.69	1.002	30	30	1.000	363.42			
01/05/2006	31/05/2006	363.42	1.003	31	31	1.000	364.51			
01/06/2006	30/06/2006	364.51	1.001	30	30	1.000	364.87			
01/07/2006	31/07/2006	364.87	1.002	31	31	1.000	365.60			
01/08/2006	31/08/2006	365.60	1.002	31	31	1.000	366.33			
01/09/2006	30/09/2006	366.33	1.000	30	30	1.000	366.33			
01/10/2006	31/10/2006	366.33	0.998	31	31	1.000	365.60			
01/11/2006	30/11/2006	365.60	1.001	30	30	1.000	365.97			
01/12/2006	31/12/2006	365.97	1.001	31	31	1.000	366.33			
01/01/2007	31/01/2007	366.33	1.001	31	31	1.000	366.70			
01/02/2007	<b>22/02/2007</b>	366.70	1.002	28	22	0.786	<b>367.28</b>	<b>2.50%</b>	<b>365</b>	<b>9.18</b>
23/02/2007	28/02/2007	367.28	1.002	28	6	0.214	367.43			
01/03/2007	31/03/2007	367.43	1.002	31	31	1.000	368.17			
01/04/2007	30/04/2007	368.17	1.002	30	30	1.000	368.90			
01/05/2007	31/05/2007	368.90	1.003	31	31	1.000	370.01			
01/06/2007	30/06/2007	370.01	1.002	30	30	1.000	370.75			
01/07/2007	31/07/2007	370.75	1.002	31	31	1.000	371.49			
01/08/2007	31/08/2007	371.49	1.002	31	31	1.000	372.24			
01/09/2007	30/09/2007	372.24	1.000	30	30	1.000	372.24			
01/10/2007	31/10/2007	372.24	1.003	31	31	1.000	373.35			
01/11/2007	30/11/2007	373.35	1.004	30	30	1.000	374.85			
01/12/2007	<b>31/12/2007</b>	374.85	1.004	31	31	1.000	<b>376.34</b>	<b>2.50%</b>	<b>312</b>	<b>8.04</b>
01/01/2008	31/01/2008	376.34	1.003	31	31	1.000	377.47			
02/02/2008	<b>22/02/2008</b>	377.47	1.002	29	22	0.759	<b>378.05</b>	<b>3.00%</b>	<b>53</b>	<b>1.64</b>
23/02/2008	29/02/2008	378.05	1.002	29	7	0.241	378.23			
01/03/2008	31/03/2008	378.23	1.005	31	31	1.000	380.12			
01/04/2008	30/04/2008	380.12	1.002	30	30	1.000	380.88			
01/05/2008	31/05/2008	380.88	1.005	31	31	1.000	382.78			
01/06/2008	30/06/2008	382.78	1.004	30	30	1.000	384.32			
01/07/2008	31/07/2008	384.32	1.004	31	31	1.000	385.85			
01/08/2008	<b>12/08/2008</b>	385.85	1.001	31	12	0.387	<b>386.00</b>	<b>3.00%</b>	<b>172</b>	<b>5.44</b>
								Total Revaluation (D.3)		<b>24.19</b>
								Total Interest (D.3)		<b>24.31</b>
								Total Revaluated Amount (D.1 - D.3)		<b>386.00</b>

## Damage 4

From	To	Amount	Revaluation Coefficient	Days in Month	Days Matured	Ratio	Revaluated Amount	Interest Rate	Total Days	Interest			
13/08/2008	31/08/2008	486.00	1.001	31	19	0.613	486.30						
01/09/2008	30/09/2008	486.30	0.998	30	30	1.000	485.33						
01/10/2008	31/10/2008	485.33	1.000	31	31	1.000	485.33						
01/11/2008	30/11/2008	485.33	0.996	30	30	1.000	483.39						
01/12/2008	31/12/2008	483.39	0.999	31	31	1.000	482.90						
01/01/2009	31/01/2009	482.90	0.998	31	31	1.000	481.94						
01/02/2009	28/02/2009	481.94	1.002	28	28	1.000	482.90						
01/03/2009	31/03/2009	482.90	1.000	31	31	1.000	482.90						
01/04/2009	30/04/2009	482.90	1.002	30	30	1.000	483.87						
01/05/2009	31/05/2009	483.87	1.002	31	31	1.000	484.83						
01/06/2009	30/06/2009	484.83	1.001	30	30	1.000	485.32						
01/07/2009	31/07/2009	485.32	1.000	31	31	1.000	485.32						
01/08/2009	12/08/2009	485.32	1.004	31	12	0.387	486.07	3.00%	365	14.58			
13/08/2009	31/08/2009	486.07	1.004	31	19	0.613	487.26						
01/09/2009	30/09/2009	487.26	0.997	30	30	1.000	485.80						
01/10/2009	31/10/2009	485.80	1.001	31	31	1.000	486.28						
01/11/2009	30/11/2009	486.28	1.001	30	30	1.000	486.77						
01/09/2009	31/12/2009	486.77	1.001	31	31	1.000	487.26				3.00%	141	5.65
01/01/2010	31/01/2010	487.26	1.001	31	31	1.000	487.74						
01/02/2010	28/02/2010	487.74	1.001	28	28	1.000	488.23						
01/03/2010	31/03/2010	488.23	1.002	31	31	1.000	489.21						
01/04/2010	30/04/2010	489.21	1.004	30	30	1.000	491.17						
01/05/2010	31/05/2010	491.17	1.001	31	31	1.000	491.66						
01/06/2010	30/06/2010	491.66	1.000	30	30	1.000	491.66						
01/07/2010	31/07/2010	491.66	1.004	31	31	1.000	493.62						
01/08/2010	12/08/2010	493.62	1.002	31	12	0.387	494.01	1.00%	224	3.03			
13/08/2010	31/08/2010	494.01	1.002	31	19	0.613	494.61						
01/09/2010	30/09/2010	494.61	0.997	30	30	1.000	493.13						
01/10/2010	31/10/2010	493.13	1.002	31	31	1.000	494.11						
01/11/2010	30/11/2010	494.11	1.001	30	30	1.000	494.61						
01/12/2010	31/12/2010	494.61	1.004	31	31	1.000	496.59				1.00%	141	1.92
01/01/2011	31/01/2011	496.59	1.004	31	31	1.000	498.57						
01/02/2011	28/02/2011	498.57	1.003	28	28	1.000	500.07						
01/03/2011	31/03/2011	500.07	1.004	31	31	1.000	502.07						
01/04/2011	30/04/2011	502.07	1.005	30	30	1.000	504.58						
01/05/2011	31/05/2011	504.58	1.001	31	31	1.000	505.08						
01/06/2011	30/06/2011	505.08	1.001	30	30	1.000	505.59						
01/07/2011	31/07/2011	505.59	1.003	31	31	1.000	507.10						
01/08/2011	12/08/2011	507.10	1.003	31	12	0.387	507.69	1.50%	224	4.67			
13/08/2011	31/08/2011	507.69	1.003	31	19	0.613	508.63						
01/09/2011	30/09/2011	508.63	1.000	30	30	1.000	508.63						
01/10/2011	31/10/2011	508.63	1.004	31	31	1.000	510.66						
01/11/2001	30/11/2001	510.66	1.001	30	30	1.000	511.17						
01/12/2011	31/12/2011	511.17	1.003	31	31	1.000	512.70				1.50%	141	2.97
01/01/2012	31/01/2012	512.70	1.004	31	31	1.000	514.76						
01/02/2012	29/02/2012	514.76	1.004	29	29	1.000	516.81						
01/03/2012	31/03/2012	516.81	1.004	31	31	1.000	518.88						
01/04/2012	30/04/2012	518.88	1.005	30	30	1.000	521.48						
01/05/2012	31/05/2012	521.48	0.999	31	31	1.000	520.95						
01/06/2012	30/06/2012	520.95	1.002	30	30	1.000	522.00						
01/07/2012	31/07/2012	522.00	1.001	31	31	1.000	522.52						
12/08/2012	12/08/2012	522.52	1.005	31	12	0.387	523.53	2.50%	225	8.05			
13/08/2012	31/08/2012	523.53	1.005	31	19	0.613	525.13						
01/09/2012	30/09/2012	525.13	1.000	30	30	1.000	525.13						

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01/10/2012	31/10/2012	525.13	1.000	31	31	1.000	525.13			
01/11/2012	30/11/2012	525.13	0.998	30	30	1.000	524.08			
01/12/2012	31/12/2012	524.08	1.003	31	31	1.000	525.65			
01/01/2013	31/01/2013	525.65	1.002	31	31	1.000	526.70			
01/02/2013	28/02/2013	526.70	1.000	28	28	1.000	526.70			
01/03/2013	31/03/2013	526.70	1.002	31	31	1.000	527.76			
01/04/2013	30/04/2013	527.76	1.000	30	30	1.000	527.76			
01/05/2013	31/05/2013	527.76	1.000	31	31	1.000	527.76			
01/06/2013	30/06/2013	527.76	1.002	30	30	1.000	528.81			
01/07/2013	31/07/2013	528.81	1.001	31	31	1.000	529.34			
01/08/2013	12/08/2013	529.34	1.004	31	12	0.387	530.16	2.50%	365	13.25
13/08/2013	31/08/2013	530.16	1.004	31	19	0.613	531.46			
01/09/2013	30/09/2013	531.46	0.996	30	30	1.000	529.33			
01/10/2013	31/10/2013	529.33	0.999	31	31	1.000	528.80			
01/11/2013	26/11/2013	528.80	0.997	30	26	0.867	527.43	2.50%	106	3.83
								Total Revaluation (D.4)		
								41.43		
								Total Interest (D.4)		
								57.95		
								Total Revaluated Amount (D.1 - D.4)		
								527.43		

Total Interest (D.1 - D.4)	189.68
Revaluated Amount (D.1 - D.4)	527.43
Total (D.1 - D.4)	717.11

From	To	Amount		Interest Rate	Total Days	Interest
26/11/2013	31/12/2013	717.11		2.50%	35	1.72
01/09/2008	30/09/2008	717.11		1.00%	43	0.84
				Total Interest		2.26

Total Interest (D.1 - D.4)	189.68
Revaluated Amount (D.1 - D.4)	527.43
Total Interest	2.56
Total Debt	719.68



## Netherlands

Caroline Cauffman<sup>538</sup>

### *Section I. General Principles*

#### **1.1. What is interest? Is there a definition?**

- (NL.1) Interest can be defined as the compensation for damages chargeable because of a delay in the payment of a sum of money.
- (NL.2) According to Art. 6:119 Dutch Civil Code (hereinafter Civil Code or CC) the compensation for damages, chargeable because of a delay in the payment of a sum of money, normally consists of the legal interest on the unpaid part of that sum over the time for which the debtor is in default of complying with his obligation. Legal interest is normally determined in accordance with the interest rates specified in Art. 6:120 Civil code.
- (NL.3) Since the implementation of the Late Payments directive there are in fact two types of legal interest with their own interest rates: the normal legal interest at the “normal legal interest rate” referred to in Art. 6:120(1) Civil Code and the special legal interest rate that applies in the case of late payment in commercial transactions referred to in Art. 6:119 a/6:119b and Art. 6:120(2) Civil Code. However, the late payment of an obligation to compensate antitrust damages, will not be a late payment in commercial transactions within the meaning of these provisions. Indeed, the said provisions apply only to payments made as a remuneration for commercial transactions. They do not apply to obligations to pay damages.<sup>539</sup> The special legal interest for commercial transactions will therefore in principle not be further addressed in this country report.
- (NL.4) Parties are entitled to agree on a different interest rate. If the contractually determined rate is higher than the legal interest rate, it applies to the period after default. If it is lower than the legal interest rate, it is as of the moment of default, replaced by the legal interest rate (Art. 6:119(3) Civil Code). A clause determining a different interest rate qualifies as a penalty clause, which may at the request of the debtor be mitigated by the Court without going below the legal interest (see Art. 6:91 Civil Code).<sup>540</sup>

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<sup>539</sup> Cf. Recital 8 Late Payments Directive; Preparatory works for the amendment of the Civil Code in order to implement the (first) Late payments Directive: Explanatory Memorandum, *Kamerstukken II* 2001/02, 28239, 3, p. 10; W.A.K. Rank, [Comment on Art. 119a Book 6 CC] in *Tekst en Commentaar Burgerlijk Wetboek*, Deventer, Kluwer, 2015, n° 2 (hereinafter T&C Burgerlijk Wetboek, (2015)).

<sup>540</sup> H.N. Schelhaas, *Het boetebeding in het Europese contractenrecht*, Deventer, Kluwer, 21 et seq. Moreover, in B2C relationships the determination in standard terms of a much higher interest in the case of late payment by a consumer may be voidable under Art. 6:233(a) Civil Code. In B2B transactions, the determination of a lower interest rate in the case of late payment is prohibited (see Art. 6:119b (8) Civil Code).



**1.2. When, and under what conditions, is interest payable at all? Does this depend on whether the claim is brought in tort, breach of contract or (where applicable) restitution/unjust enrichment?**

- (NL.5) Art. 6:119 Civil Code applies to all cases of late performance of obligations to pay a sum of money, irrespective of the source of the obligation.
- (NL.6) Legal interest according to Art. 6:119 Civil Code is therefore due when the following requirements are fulfilled: (a) An obligation to pay a sum of money and (b) Late payment.
- (NL.7) (a) An obligation to pay a sum of money refers to any obligation to pay a sum of money. It is not required that it is a fixed sum of money, i.e. it is not required that the amount of the sum of money is determined or has been determined by a court.<sup>541</sup>
- (NL.8) (b) Late payment refers to the fact that the debtor needs to be in *default* (*verzuim*).<sup>542</sup> Pursuant to Article 6:81 Civil Code, the debtor is in default during the time that performance is not carried out in conformity with the obligation after it has become *due and demandable* (*opeisbaar*), provided that the *requirements of Article 6:82 and 6:83 are met*, except insofar as the delay *cannot be attributed* to him or it has become *permanently impossible to perform the obligation*.

*Due and demandable* - When a claim for damages becomes due and demandable depends on whether the damage is calculated abstractly or concretely and how the future damage is quantified.<sup>543</sup>

The starting point under Dutch law is the concrete quantification of the damage: the actually suffered damage is to be compensated. This is determined by comparing the situation of the creditor after the event causing the damage and the situation he had been in had the damage causing event not occurred.<sup>544</sup>

Dutch law, however, also allows an abstract quantification of the damage.<sup>545</sup> The abstract quantification implies that the court does not focus on the specificities of the concrete case and the subjective circumstances of the victim but assesses the average quantity of the damage suffered in similar cases. The damage is then equated with the objectively assessed diminution of the assets of the victim.<sup>546</sup>

Dutch law is not very clear on when the damage will be quantified abstractly or concretely,<sup>547</sup> although Art. 6:96 Civil Code provides that (only) where the extent of the damage cannot be assessed exactly, it shall be estimated.

<sup>541</sup> W.A.K. Rank, *Groene Serie Verbintenissenrecht*, Deventer, Kluwer, Art. 119 Book 6 CC, (2004), n° 17 (hereinafter *GS Verbintenissenrecht*). See already before the entry into force of the new Dutch Civil Code in 1992: Supreme Court 30 May 1851, W 1238.

<sup>542</sup> A.S. Hartkamp & C.H. Sieburgh, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel II. De verbintenis in het algemeen, tweede gedeelte*, Deventer: Kluwer 2013, 2014 Asser/Hartkamp & Sieburgh 6-II 2013).

<sup>543</sup> Asser/Hartkamp & Sieburgh 6-II 2013/214. Comp. C.J. van Zeben en J.W. du Pon (eds.), *Parlementaire geschiedenis van het nieuwe Burgerlijk wetboek, Boek 6 Algemeen gedeelte van het verbintenissenrecht*, Deventer: Kluwer 1981, p. 475 (hereinafter *Parl. Gesch. Boek 6* 1981).

<sup>544</sup> Asser/Hartkamp & Sieburgh 6-II 2013/31. See e.g. Supreme Court 28 March 2003, NJ 2003/389.

<sup>545</sup> See Art. 6:97 Civil Code: The court estimates the extent of the damage in the way which is most consistent with the nature of the damage caused. Where the extent of the damage cannot be assessed exactly, it shall be estimated.

<sup>546</sup> Asser/Hartkamp & Sieburgh 6-II 2013/35.

<sup>547</sup> Asser/Hartkamp & Sieburgh 6-II 2013/38.

When the damage is quantified abstractly, legal interest will become due and demandable at the moment the damage arose. When the damage is quantified concretely, legal interest only becomes due as of the moment the claimant actually incurred costs, for example by making payments to repair the damage caused.<sup>548</sup>

In the case of overcharges paid, it is very difficult to assess the exact moment the damage arose since this depends on the the loss of profits resulting from a lower profit margin on each object sold and on the loss of profits resulting from the diminution of the volume of sales as a result of higher prices. A concrete quantification would imply that the debt becomes due at the moment of each sale at a lower profit margin and at each moment that an additional sale would have taken place had the prices been lower. Since the first element would lead to complicated calculations and the second element cannot be determined exactly, an abstract quantification will need to take place, which could result in the debt becoming due at the moment the payment was made to the carteliser, at the moment the contract with the carteliser was concluded and the obligation to pay arose, or perhaps somewhere in the middle of the period during which the goods bought at cartelized prices were resold.

It is not required that the damage is quantified for the claim to be due and demandable. A claim may be due and demandable even though the parties are still negotiating or litigating on its quantification.<sup>549</sup>

*Requirements of Article 6:82 and 6:83 Civil Code* – Pursuant to Art. 6:82 (1) Civil Code a debtor is normally only in default once he has been held liable for his non-performance by a written notice of default, in which the creditor grants him a reasonable period of time during which he still may perform in conformity with his obligation, and the debtor nevertheless fails to accomplish the indebted performance within that period. However, Article 6:83 Civil Code provides for exceptions to this rule: “Default commences, without a notification of default:

- a. where a period of time lapses without the obligation having been performed, except when this time period appears to have a different purpose.
- b. when the obligation results from tort or [from contractual non-performance]<sup>550</sup>, and the indebted obligation is not performed immediately;
- c. when the creditor must understand from a statement of the debtor that he will not perform the obligation.”

A claim for competition law damages will fall under the exception of Article 6:83(b) Civil Code, so that the debtor will be in default as of the moment the obligation is due.

*Attributability* – The debtor will not be in default if he proves that the damage causing event cannot be attributed to him.

Pursuant to Art. 6:74 Civil Code a contractual non-performance cannot be attributed to the debtor if he is not to blame for it or accountable for it by virtue of law, a juridical act or generally accepted principles.

Pursuant to Art. 6:162(3) Civil Code “A tortious act can be attributed to the tortfeasor if it results from his fault or from a cause for which he is accountable by virtue of law or generally accepted principles.”

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<sup>548</sup> W.A.K. Rank, *GS Verbintenissenrecht*, Art. 119 Book 6 CC, (2004), n° 6.

<sup>549</sup> See Asser/Hartkamp & Sieburgh 6-II 2013/214. See also Supreme Court 12 april 1985, NJ 1985/625 and Supreme Court 17 October 1997, NJ 1998/508.

<sup>550</sup> The text of the Article is in fact “when it forces the debtor to pay for damages as meant in Article 6:74 paragraph 1”.

*Permanently impossible to perform the obligation* – The debtor will not be in default if he proves that it is permanently impossible to perform the obligation. Obligations to pay a sum of money are hardly ever impossible to perform.

- (NL.9) The right to legal interest exists in all cases of late payment of a sum of money, irrespective of the source of the obligation to pay. However, as a result of the implementation of the late payments directive there exists next to the “normal regime” for legal interest (Art. 6:119), a special regime for legal interest on obligations following from commercial agreements between professional private parties (Art. 6:119a) or between a professional private party and the government (Art. 6:119b).

### **1.3. Is payment of interest compulsory or at the discretion of the court?**

- (NL.10) In principle, payment of legal interest when rightfully claimed is compulsory.

- (NL.11) However, as any compensation, interest can be moderated by the court in accordance with Article 6:109 Civil Code. This Article provides that:

“- 1. The court may reduce the amount of an obligation to pay for damages if a full award of damages would lead to obviously unacceptable results in view of the circumstances of the given situation, for example the nature of the liability, the legal relationship between parties and their financial resources.

- 2. The amount of the obligation to pay for damages cannot be reduced to a lower amount than that for which the debtor has covered his liability by insurance or was compelled to do so.

- 3. Every contractual provision in derogation from paragraph 1 is null and void.”

A moderation of legal interest may however not be based on the fact that the creditor’s loss as a result of the late payment did not amount to the legal interest.<sup>551</sup>

- (NL.12) Art. 6:100 Civil Code providing for the offsetting of benefits does not apply.<sup>552</sup>

### **1.4. What is said to be the purpose of the interest payment?**

- (NL.13) The purpose of the legal interest is the compensation for damages chargeable because of a delay in payment of a sum of money. Legal interest serves rather to compensate the claimant for the cost of having to borrow the amount of money that is paid too late than to compensate him for the interest he could have earned had he disposed of the said sum.<sup>553</sup>

<sup>551</sup> Asser/Hartkamp & Sieburgh 6-II 2013/213. See Supreme Court 2 March 2001, NJ 2001/584; Supreme Court 14 januari 2005, NJ 2007/481; Supreme Court 14 January 2005, NJ 2007/482.

<sup>552</sup> Asser/Hartkamp & Sieburgh 6-II 2013/213; W.A.K. Rank, T&C Burgerlijk Wetboek, comment on Art. 6:119 CC, (2015), n° 2; Supreme Court 11 February 2000, NJ 2000/275; Supreme Court 14 January 2005, NJ 2007/481. Art. 6:100 reads: “Article 6:100 Offsetting benefits - When the injured person has not only suffered damage from an event, but also a benefit, then this benefit has to be subtracted, as far as this is reasonable, from the damage that has to be compensated to him.”

<sup>553</sup> E.B. Rank-Berenschot; *GS Verbintenissenrecht*, Art. 120 Book 6 CC, (2002), n° 1; Explanatory Memorandum to Act 7 October 1970, Stb. 458, modifying Articles 1286 and 1804 CC.

**1.5. What is the legal basis for the payment of interest (statutes, contractual agreements, case-law, soft law guidance)?**

- (NL.14) Art. 6:119, 6:119a, 6:119b, 6:120 of the Civil Code establish the right to interest in case of late payment of a sum of money. The interest rate referred to in 6:120(1) is determined by general administrative measure, cf. supra n° 2-3 juncto infra n° 16-17.
- (NL.15) The parties are in principle free to determine a contractual interest rate that differs from the legal interest rate, cf. supra n° 4.

**Section II. Calculation of Interest**

**2.1. What is the rate of interest that is set? How is it arrived at? Are there statutes?**

- (NL.16) Article 6:120 (1) (Legal interest rate) Civil Code provides that:

“- 1. The rate of the legal interest meant in Article 6:119 is determined by a general administrative measure (*algemene maatregel van bestuur*). Legal interest that was already running at the moment in which, by general administrative measure, a new interest rate has become effective, will as of that moment be calculated according to the new interest rate.”

- (NL.17) Since 1 January 2002 the legal interest rate is based on the interest rate applied by the European Central Bank to its most recent main refinancing operation which took place before the first calendar day of the concerned half year (ultimo April and ultimo October) increased with 2,25 percentage points. In order to prevent strong fluctuations, the increase or decrease is limited to 2 percentage points and halves or more are rounded upwards and others downwards.<sup>554</sup> For an overview of the interest rates, cf. *infra* 2.5.

**2.2. Is interest simple or compound? If the interest is neither simple nor compound as defined above, please elaborate.**

- (NL.18) The interest is compound. This follows from Art. 6:119(2) Civil Code: At the end of each year the amount on which the legal interest is to be calculated, shall be increased by the unpaid legal interest chargeable over that year.

**2.3. What is the time for which interest is calculated? When does interest start to accrue, when does the accrual of interest end? Are there any situations where the action of the plaintiff, for example delay on his part, serves to change the time for which interest is calculated? Are there provisions for suspension of the accrual of interest?**

- (NL.19) Legal interest is due from the moment the debtor is in default, that is the date when the harm occurred, until actual payment. Cf. supra n° 5 et seq.
- (NL.20) Legal interest is regarded as a type of damages.<sup>555</sup> As other kinds of damages, the legal interest may be mitigated in accordance with Article 6:109 Civil Code. Cf. supra n° 11.

<sup>554</sup> Explanatory Memorandum, Decision 3 July 2003, Dutch Official Journal 2003, 280; W.A.K. Rank, T&C Burgerlijk Wetboek, comment on Art. 120 Book 6 CC, (2015).

<sup>555</sup> Art. 6:119 Civil Code; Supreme Court 30 January 1959, NJ 1959/162; Supreme Court 8 December 1972, NJ 1973/377; Supreme Court 5 January 1979, NJ 1979/207; Asser/Hartkamp & Sieburgh 6-II 2013/213.

**2.4. Are there any specific provisions if payment is requested in a different currency than that in the state where the lawsuit is brought? (e.g. a Swedish company claims for damages resulting from an EU-wide cartel against a German cartel member in Germany. Can the court award only EUR or also Swedish Krona?)**

(NL.21) Dutch courts may award damages in a different currency than the euro.<sup>556</sup>

(NL.22) Articles 6:121, 6:122 and 6:125 Civil Code deal with payments in other currency<sup>557</sup>  
Article 6:121 Payment in another currency

- 1. Where an obligation necessarily implicates the payment of another currency than that of the country where the payment must take place, the debtor may also pay his debt in the currency of the place of payment.
- 2. The previous paragraph does not apply when law, common practice or a juridical act imply that the debtor has to pay effectively in the currency specified by the obligation.

Article 6:122 A payment in foreign currency is impossible

- 1. Where an obligation necessarily implicates the payment of another currency than that of the country where the payment must take place and the debtor is not able or claims to be unable to pay his debt in this currency, the creditor may require payment in the currency of the place of payment.
- 2. The previous paragraph applies too if the debtor is obliged to pay effectively in the currency specified by the obligation.

Article 6:125 Exchange rate damages

- 1. Article 6:119 [and 6:119a] leave[s] unimpaired the right of the creditor to claim compensation for damage suffered because, after the day on which the debtor became liable for damages, the exchange rate of the currency specified by the obligation has changed in comparison to the currency of one or more other countries.
- 2. The previous paragraph does not apply if the obligation denominates the payment in Dutch currency and the payment must take place in the Netherlands, provided that the creditor at the moment in which the obligation came to existence had his domicile in the Netherlands.

**2.5. As damage claims for infringements of EU competition rules often pertain to long-running infringements, please include all applicable interest rates and the date the rate came into force from 1 January 1985 until today. Unless impossible due to national peculiarities, the rates should be listed in a two column table, containing the rate and the date it came into force. This should be accompanied by a legal retrospective that sets out any other changes to the relevant interest regime (e.g. the time interest starts to run, etc.) which occurred over this period, in order to allow a determination of which rules applied at a given point in time between 1 January 1985 and today.**

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<sup>556</sup> See e.g. Court Zutphen 9 April 2008, ECLI:NL:RBZUT:2008:BD3647, Rechtspraak.nl, VR 2008, 139, JA 2008/132, VR 2008, 152; Court Rotterdam 6 January 2010, ECLI:NL:RBROT:2010:BN9326, Rechtspraak.nl; Court Arnhem 29 August 2007, Rechtspraak.nl.

<sup>557</sup> See also Article 6:126 Civil Code: Definition of exchange rate: For the purpose of this Section the rate of exchange shall be the rate against which the creditor immediately can provide himself the money, taking into account what may result from law, common practice and the content and intention of the obligation.

Table 1 - Interest Rates (Example)

Date	Rate
01/01/1983	9.00%
01/04/1987	8.00%
01/01/1990	10.00%
01/07/1990	11.00%
01/01/1992	12.00%
01/07/1993	10.00%
01/01/1994	9.00%
01/01/1995	8.00%
01/01/1996	7.00%
01/07/1996	5.00%
01/01/1998	6.00%
01/01/2001	8.00%
01/01/2002	7.00%
01/08/2003	5.00%
01/02/2004	4.00%
01/07/2007	6.00%
01/07/2009	4.00%
01/10/2010	3.00%
01/07/2011	4.00%
01/07/2012	3.00%
01/01/2015	2.00%

Provisions of the old Dutch Civil Code dealing with interests since the entry into force of the Act of 7 October 1970 on 1/3/1971<sup>558</sup>

Art. 1286

With regard to obligations which only concern the payment of a specific sum of money, compensation of costs, damage and interests resulting from delay in performance only consists of the legal interests, the amount whereof is determined by means of a general administrative measure, unless specific statutory provisions apply.

The compensation of costs, damage and interests is due without the creditor having to prove any loss.

Unless specific statutory provisions apply, legal interest is calculated as of the day it has been claimed in court proceedings, unless after the claim became due, the debtor has been given a written notification of default mentioning that the creditor in the case of further delay claimed compensation of interest. In the latter case legal interest was calculated as of the day by which the debtor was admonished to pay.

Legal interest accruing on the moment a new legal interest rate determined by a general administrative measure, as referred to in the first paragraph, is as of that moment calculated according to the new interest rate.

<sup>558</sup> Dutch Official Journal 458.

Art. 1287

Interests on main sums can earn interest themselves as a consequence of a judicial claim, or a special agreement provided the claim or agreement concerns interest chargeable for at least an entire year.

Art. 1288

Nevertheless, due income, such as rent and lease money, perpetual rents or annuities earn interest as of the day they are claimed or the contract has been concluded.

The same rule applies to returns of fruits and on interests paid by a third party to the creditor in order to discharge the debtor.

Brief analysis of the interest rules between 1/3/1971 and 31/12/1991

Under the system of the old Civil Code a distinction was made between legal interest and compensatory interests.

Since the modification of Art. 1286 old Dutch Civil Code, the rules on legal interests were very similar to those that are currently applicable.

Compensation for late payment of a certain sum of money only consisted of the legal interest, the rate of which was determined by administrative measures. The creditor did not need to prove he suffered damage as a result of the late payment. He was not entitled to prove he suffered more damage as a result of the late payment and the debtor was not entitled to prove that the creditor had suffered less damage.

A difference existed with regard to the moment as of which legal interest started to accrue. In general legal interest started to accrue as of the moment it was claimed in legal proceedings. When the interest claim was not yet made in the introductory writ, interest ran only as of the later moment on which it was claimed. The creditor could however make it start earlier by sending the debtor a written notice of default mentioning that in the case of further delay he claimed interests. In that case the interests accrued as of the moment of the notification of default.

When the sum of money was to be paid in a non-Dutch currency, exchange damage could be claimed in addition to legal interest.

Art. 1286 Civil Code only applied in cases of late payment of a sum of money. It did not apply when the loss of interest was part of a claim for damages resulting from a different kind of non-performance or from non-contractual liability. In such cases compensatory interests could be claimed for the loss of income due to the fact of missing an asset during a certain period of time. In order to obtain compensatory interests, the creditor had to prove his loss. There was no fixed rate of compensatory interest, the amount of the damage had to be proven *in casu*. Compensatory interest started to accrue as of the day the harm was suffered, for example as of the day the victim paid the costs of repairing goods that had tortiously been demolished.

However, when the compensation due to repair tortuously caused damage was paid late, it could give rise to legal interest under Art. 1286.

The availability of compensatory interest next to legal interest was justified by the fact that legal interest was only due as of the moment it was claimed in legal proceedings, or since the modification by Act of 7 October 1970, as of the moment of a notice of default satisfying specific requirements. Under the system of the new Dutch Civil Code, the situation that a

person suffers damage due to a loss of income without being entitled to legal interest no longer occurs. Therefore, compensatory interest no longer exists.<sup>559</sup>

Under the old system, interest on the main sum could earn interest as a consequence of a judicial claim, or a special agreement provided the claim or agreement concerns interest chargeable for at least an entire year (Art. 1287).

### Transitory Rules

The main rule is that as of the date the new Civil Code entered into application (i.e. 1/1/1992), its articles apply when the conditions for its application are satisfied (Article 68a of the Transitory Act New Civil Code (Art. 68a(1) Transitory Act New Dutch Civil Code).

However, liability for damage that arose after or became known after the entry into force of the new Civil Code is subject to the old Civil Code when it results from the same event as previously by the victim suffered damage to which the old Civil Code applied (Art. 173 (2) Transitory Act New Dutch Civil Code). The case decided by the Dutch Supreme Court on 10 June 2011 provides an application of this rule. On 23 november 1991 (before the entry into force of the new Civil Code) a person was injured by a car accident. After the entry into force of the new Civil Code the victim incurred extrajudicial costs as a result of the car accident. Because the extrajudicial costs constituted damage resulting from the same event as prior to the entry into force incurred damage (such as loss of income due to physical injuries), the rules of the old Civil Code applied to the extrajudicial costs and the interests thereon.<sup>560</sup>

The relevant provisions of the Transitory Act are the following:

#### Art. 68 a Transitory Act New Dutch Civil Code

1. The Act applies from the date of its entry into force if on that date the requirements for the occurrence of the legal consequence are met, unless the following provisions provide otherwise.
2. Insofar and as long as the Act does not apply pursuant to the following articles, the law as it applied before its entry into force remains applicable.

#### Art. 173 Transitory Act New Dutch Civil Code

1. When the application of the rules of the Act (i.e. the new Civil Code) relating to liability and compensation is determined by the fact of whether damage arose before or after the entry into force of the Act and this is not clear then it is determining whether the damage became known before or after the entry into force of the Act.
2. Liability for damages arising after, or becoming known after the entry into force of the Act is to be judged, including with regard to its quantity, under the previously applicable law if the damage arises out of the same event as previous damage suffered by the injured party to which that law applied. (...)

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<sup>559</sup> See Asser/Rutten, 1978, 217 et seq; Parl.Gesch. Boek 6, 475-476.

<sup>560</sup> For an application, see HR 10 June 2011, ECLI:NL:HR:2011:BP9867, RvdW 2011/725, NJB 2011, 1266, NJ 2011/271, Rechtspraak.nl.



**2.6. Please identify an official, reliable, publicly available source that publishes the pertinent legal interest rates as they change.**

- (NL.23) The general administrative measures referred to in Art. 6:119(1) Civil Code, determining the (normal) legal interest rate are published in the Dutch Official Journal (Staatsblad), which can be found at <https://zoek.officielebekendmakingen.nl/zoeken/staatsblad> (via [www.overheid.nl](http://www.overheid.nl)).

Unofficial overviews of the (normal) legal interest rate over several years are published by De Nederlandse Bank ([www.dnb.nl](http://www.dnb.nl)).

**2.7. If interest rates change on a fixed schedule, please indicate the schedule.**

- (NL.24) The legal interest rate may be changed on 1 January and on 1 July of each year.<sup>561</sup>

**2.8. If part of the debt / the damage is being paid, how is interest calculated following that payment? In particular, do partial payments first cover interest or the principal amount? Is there any provision or legal practice similar to Art. 86(3)(2) of the rules of application of Regulation 966/2012 on the financial rules applicable to the general budget of the Union where it is stated that “Any partial payments shall first cover the interest”?**

- (NL.25) This is dealt with by Article 6:44 Civil Code: “Imputation of a performance in money to two or more obligations

1. A performance in money (payment) that could be imputed to a specific obligation, diminishes firstly the involving costs, subsequently the accrued interests and finally the principle sum and running interests.

2. The creditor may, without causing a default as referred to in Section 6.1.8 of the Civil Code, refuse a payment offered, if the debtor points out another order for the imputation of his payment than the one mentioned in the previous paragraph.

3. The creditor may refuse the payment of the full principal sum if the accrued and running interests and the involving costs are not paid at the same time.”

If the debtor owes the creditor more than one debt, first Article 6:43 Civil Code is to be applied. This Article reads as follows:

“Imputation of a performance to two or more obligations

1. When the debtor has made a performance that could be imputed to two or more obligations that are indebted to the same creditor, then it is imputed to the obligation that the debtor has pointed out when he made the performance.

2. In the absence of such an indication, the performance is imputed to all due and demandable obligations that cover this type of performance. When there are two or more of such due and demandable obligations, then the performance is imputed firstly to the most burdensome obligation and, when there are two or more equally burdensome obligations, to the oldest obligation. Where these obligations are equally old, the performance is imputed proportionality.”

**2.9. Please calculate interest in the following hypothetical case. All dates are given in the format dd.mm.yyyy. All amounts are stated without specifying the currency to abstract**

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<sup>561</sup> Explanatory Memorandum, Decision 3 July 2003, Official Journal. 2003, 280.

from implications of the introduction of the common Euro currency. Assume that the claims have not been time barred. Assume that a national court in the Member State on which you are reporting has jurisdiction to rule on the case. Assume that the cartelists are jointly liable for the damage caused by the cartel. If results differ materially depending on whether accrual of interest is based purely on national law or made in compliance with the EU principle of full compensation, provide both calculations.

There was a long running pan-European cartel for a product that materially affected trade between Member States. The cartel lasted from the beginning of 1993 until the dawn raids (unannounced inspections) of the European Commission on 02.02.2009.

On 30.11.2010, a longtime customer of the cartel, who bought the cartelised product in the Member State on which you are reporting, brings a claim for damages against three cartelists (A, B, and C). All of the three defendants have their seat in the Member State on which you are reporting. The customer only bought the cartelised product of the cartelists A and B. In the writ, the claimant specifies the damages caused by the cartel and the date on which the respective damage occurred. The claimant also specifically requests that interest be paid on the damages. The damages (always = 100) and respective dates are set out in Table 2 below. Should a subjective rate be of relevance, you will find the ROI (Return On Investment) rates of the claimant and the three defendants in Table 3 below. You will also find the average interest rate that the claimant had to pay on credit taken out in that year (claimant's average refinance rate).

On 26.11.2013 a court renders a final judgment, ordering the defendant(s) to pay damages and interest. The defendants take until 12.02.2014 to pay. Please specify the total amount the jointly liable defendants have to pay on 12.02.2014 in order to relinquish their debt towards the claimant.

Table 2 - Damage Amounts and Dates

Date the damage occurred	Damage amount
15/11/1993	100
17/09/1996	100
22/02/2006	100
12/08/2008	100

Table 3 - Refinance and Return on Investment Rates

Year	Claimant's Refinance Rate	Claimant's Annual ROI	Defendant's A Annual ROI	Defendant's B Annual ROI	Defendant's C Annual ROI
1993	6.00%	5.50%	4.00%	4.00%	3.00%
1994	6.00%	9.80%	4.00%	4.00%	4.00%
1995	6.00%	9.50%	4.00%	4.00%	5.00%
1996	6.00%	1.00%	0.00%	0.00%	0.00%
1997	8.00%	-3.80%	1.00%	1.00%	3.00%
1998	8.00%	1.10%	4.00%	4.00%	5.00%
1999	8.00%	2.80%	1.00%	1.00%	3.00%
2000	8.00%	1.10%	-2.00%	-1.00%	0.00%
2001	8.00%	4.51%	2.00%	2.00%	3.00%
2002	8.00%	5.30%	4.00%	4.00%	5.00%
2003	8.00%	8.21%	9.00%	9.00%	9.00%
2004	7.00%	9.00%	3.00%	3.00%	2.00%
2005	7.00%	10.00%	1.00%	1.00%	1.00%

*Netherlands*

2006	7.00%	6.00%	1.00%	1.00%	1.00%
2007	5.00%	-5.00%	4.00%	4.00%	2.00%
2008	5.00%	-7.00%	-1.00%	0.00%	0.00%
2009	5.00%	-5.00%	2.00%	2.00%	4.00%
2010	5.00%	-3.00%	4.00%	4.00%	4.00%
2011	5.00%	-2.70%	4.00%	4.00%	2.00%
2012	5.00%	1.61%	-2.00%	-1.00%	0.00%
2013	5.00%	4.40%	8.00%	8.00%	7.00%
2014	5.00%	1.41%	-4.00%	-3.00%	-1.00%

If not stated otherwise by the corresponding legislation, all calculations should be: i) done with the highest precision possible; ii) based on a determination of the exact part of the month and of the year matured, taking account of leap years. Table 4 below provides an example related to a simplified scenario. It should be noted that Table 4 below shows the capital and the accrued interest rounded to two decimal places (whole cents) only for ease of presentation.

Table 4 – Payment of 15/11/1993

From	To	Interest Rate	Total Days	Days in Year	Interest factor for period	Reevaluated Amount	Interest
15/11/1993	31/12/1993	10.00%	47	365	1.0123484	101.23484377	1.23
01/01/1994	31/12/1994	9.00%	365	365	1.0900000	110.34597971	9.11
01/01/1995	31/12/1995	8.00%	365	365	1.0800000	119.17365809	8.83
01/01/1996	30/06/1996	7.00%	182	366	1.0342168	123.25140415	4.08
01/07/1996	31/12/1996	5.00%	184	366	1.0248317	126.31194409	3.06
01/01/1997	31/12/1997	5.00%	365	365	1.0500000	132.62754130	6.32
01/01/1998	31/12/1999	6.00%	730	365	1.1236000	149.02030540	16.39
01/01/2000	31/12/2000	6.00%	366	366	1.0600000	157.96152373	8.94
01/01/2001	31/12/2001	8.00%	365	365	1.0800000	170.59844563	12.64
01/01/2002	31/07/2003	7.00%	577	365	1.1128856	189.85655213	19.26
01/08/2003	31/12/2003	5.00%	153	365	1.0206623	193.77943237	3.92
01/01/2004	31/01/2004	5.00%	31	366	1.0041411	194.58188284	0.80
01/02/2004	31/12/2004	4.00%	335	366	1.0365509	201.69402193	7.11
01/01/2005	31/12/2006	4.00%	730	365	1.0816000	218.15225412	16.46
01/01/2007	31/12/2007	6.00%	365	365	1.0600000	231.24138937	13.09
01/01/2008	31/12/2008	6.00%	366	366	1.0600000	245.11587273	13.87
01/01/2009	30/06/2009	6.00%	181	365	1.0293165	252.30181299	7.19
01/07/2009	31/12/2009	4.00%	184	365	1.0199683	257.33984850	5.04
01/01/2010	30/06/2011	3.00%	546	365	1.0452089	268.97388897	11.63
01/07/2011	31/12/2011	4.00%	184	365	1.0199683	274.34483732	5.37
01/01/2012	30/06/2012	4.00%	182	366	1.0196946	279.74795628	5.40
01/07/2012	31/12/2012	3.00%	184	366	1.0149711	283.93609763	4.19
01/01/2013	11/02/2014	3.00%	407	365	1.0335093	293.45059470	9.51
							<b>193.45</b>

Table 5 - Payment of 17/09/1996

From	To	Interest Rate	Total Days	Days in Year	Interest factor for period	Reevaluated Amount	Interest
17/09/1996	31/12/1996	5.00%	106	366	1.0142308	101.42307919	1.42
01/01/1997	31/12/1997	5.00%	365	365	1.0500000	106.49423315	5.07
01/01/1998	31/12/1999	6.00%	730	365	1.1236000	119.65692037	13.16
01/01/2000	31/12/2000	6.00%	366	366	1.0600000	126.83633559	7.18
01/01/2001	31/12/2001	8.00%	365	365	1.0800000	136.98324244	10.15
01/01/2002	31/07/2003	7.00%	577	365	1.1128856	152.44667684	15.46
01/08/2003	31/12/2003	5.00%	153	365	1.0206623	155.59658158	3.15

01/01/2004	31/01/2004	5.00%	31	366	1.0041411	156.24091493	0.64
01/02/2004	31/12/2004	4.00%	335	366	1.0365509	161.95165790	5.71
01/01/2005	31/12/2006	4.00%	730	365	1.0816000	175.16691319	13.22
01/01/2007	31/12/2007	6.00%	365	365	1.0600000	185.67692798	10.51
01/01/2008	31/12/2008	6.00%	366	366	1.0600000	196.81754365	11.14
01/01/2009	30/06/2009	6.00%	181	365	1.0293165	202.58754579	5.77
01/07/2009	31/12/2009	4.00%	184	365	1.0199683	206.63287245	4.05
01/01/2010	30/06/2011	3.00%	546	365	1.0452089	215.97450849	9.34
01/07/2011	31/12/2011	4.00%	184	365	1.0199683	220.28714989	4.31
01/01/2012	30/06/2012	4.00%	182	366	1.0196946	224.62562291	4.34
01/07/2012	31/12/2012	3.00%	184	366	1.0149711	227.98852097	3.36
01/01/2013	11/02/2014	3.00%	407	365	1.0335093	235.62825446	7.64
							<b>135.63</b>

Table 6 – Payment of 22/2/2006

From	To	Interest Rate	Total Days	Days in Year	Interest factor for period	Reevaluated Amount	Interest
22/02/2006	31/12/2006	4.00%	313	365	1.0342051	103.42050921	3.42
01/01/2007	31/12/2007	6.00%	365	365	1.0600000	109.62573977	6.21
01/01/2008	31/12/2008	6.00%	366	366	1.0600000	116.20328415	6.58
01/01/2009	30/06/2009	6.00%	181	365	1.0293165	119.60995810	3.41
01/07/2009	31/12/2009	4.00%	184	365	1.0199683	121.99836431	2.39
01/01/2010	30/06/2011	3.00%	546	365	1.0452089	127.51377094	5.52
01/07/2011	31/12/2011	4.00%	184	365	1.0199683	130.06000277	2.55
01/01/2012	30/06/2012	4.00%	182	366	1.0196946	132.62148588	2.56
01/07/2012	31/12/2012	3.00%	184	366	1.0149711	134.60697859	1.99
01/01/2013	11/02/2014	3.00%	407	365	1.0335093	139.11756289	4.51
							<b>39.12</b>

Table 7 - Payment of 12/8/2008

From	To	Interest Rate	Total Days	Days in Year	Interest factor for period	Reevaluated Amount	Interest
12/08/2008	31/12/2008	6.00%	142	366	1.0228645	102.28645390	2.29
01/01/2009	30/06/2009	6.00%	181	365	1.0293165	105.28513504	3.00
01/07/2009	31/12/2009	4.00%	184	365	1.0199683	107.38749905	2.10
01/01/2010	30/06/2011	3.00%	546	365	1.0452089	112.24236516	4.85
01/07/2011	31/12/2011	4.00%	184	365	1.0199683	114.48365315	2.24
01/01/2012	30/06/2012	4.00%	182	366	1.0196946	116.73836587	2.25
01/07/2012	31/12/2012	3.00%	184	366	1.0149711	118.48607043	1.75
01/01/2013	11/02/2014	3.00%	407	365	1.0335093	122.45645454	3.97
							<b>22.46</b>

On 12/02/2014 the debtor needs to pay:  $(4 \times 100) + 193.45 + 135.63 + 39.12 + 22.46 = 790.65$ .

### Section III. Procedural Aspects

**3.1. What are the procedures for the party seeking to receive interest on the damages paid? (e.g. does the claimant have to make a separate plea for the interest payments and if so, what information and evidence must be supplied? Does the judge award interest *ex officio* or does the claimant have to request it?).**

(NL.26) The claimant needs to claim interest on the damages. As far as the legal interest is concerned, the claimant is however not required to prove that he has actually suffered loss as a result of the late payment. See further, *infra* n° 39 et seq.

**3.2. Can the judge award a higher interest amount than requested by the claimant or does the principle of *ne ultra petita* apply?**

(NL.27) No, the principle *ne ultra petita* applies.

**3.3. Can the judge estimate interest or does interest always have to be calculated?**

(NL.28) The legal interest needs to be calculated. If it is not clear when the debtor was in default, the Court may however decide as of which moment he should be considered to have become in default so that the legal interest starts from that moment.

**3.4. If the claimant changes the request regarding the interest, is this regarded as an amendment of the pleadings? Is this only possible until a certain stage into the proceedings and precluded later on or can the claimant make such changes without negative procedural consequences at any time up to the judgment?**

(NL.29) If the claimant notices that he forgot to claim interest in his original claim and claims it for the first time during the proceedings or if he increases his request in relation to interest, this is regarded as an amendment or increase of the claim. Whether the change is qualified as an amendment or an increase of the claim is not important since the same rules apply for both.

(NL.30) In principle, the claimant may change or increase his claim until the court has given its final judgment. He needs to do this in writing. The defendant is entitled to object to the change or the increase of the claim on the grounds that the change or increase is contrary to the requirements of due process.<sup>562</sup> This is often substantiated by the fact that it is not or no longer possible for the defendant to defend himself against the increased or amended claim or that the increase or amendment of the claim leads to an unreasonable prolongation of the procedure.<sup>563</sup> The first objection can sometimes be remedied by the fact that the defendant is given the opportunity to amend his defence.<sup>564</sup> The defendant could however argue that he would have introduced a third party or would have brought a counterclaim had he known of the increase or amendment of the claim. The introduction of a third party or counterclaim needs to take place

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<sup>562</sup> Art. 130(1) Code of civil procedure.

<sup>563</sup> A.C. Van Schaick, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht, Procesrecht, II, Eerste aanleg*, Deventer, Kluwer, 2011, 177 (hereinafter: Asser Procesrecht/Van Schaick 2 2011); Supreme Court 12 February 1992, NJ 1992, 439 (Meilink/KZIJ).

<sup>564</sup> Asser Procesrecht/Van Schaick 2 2011/177; Supreme Court 12 May 2006, NJ 2006, 293.

in the first written piece submitted by the defendant.<sup>565</sup> The court decides as soon as possible after hearing the parties. The court may also on the same ground refuse the increase or amendment of the claim of its own motion.<sup>566</sup> No appeal is possible against the Court's decision on the increase or amendment of the claim.<sup>567</sup>

If a party has not appeared in the proceedings, an amendment or an increase of the claim against that party is impossible, unless the claimant notified the amendment or increase by means of an writ of summons (*exploot*) in due time. The statutory periods for writs of summons need to be taken into account.<sup>568</sup>

(NL.31) A diminution of the claim is possible until the court has given its final judgment.<sup>569</sup>

(NL.32) According to the Code of civil procedure, the same rules apply on appeal.<sup>570</sup> However, the Supreme Court has developed further limitations. In *Willemsen/NOM*<sup>571</sup> and *Wertenbroek/Van den Heuvel*<sup>572</sup> the Court decided that insofar as new facts and opinions aim to modify the dictum of the first instance judge, they normally need to be put forward in the first document that the parties submit on appeal. Insofar as they only serve to have the appeal against the first instance decision rejected, they are only limited by the requirements of due process. This also applies to amendments and increases of the claim.<sup>573</sup>

(NL.33) Exceptions to the rule that new facts and opinions, such as an increase or amendment of the claim, may only be asserted in the first document submitted by a party on appeal are:

- the counterparty unambiguously agrees to the later assertion of the facts or opinions<sup>574</sup>
- the application of the main rule would conflict with the requirements of due process, for example in the case of a judicial mistake<sup>575</sup>, new developments after the submission of the first document,<sup>576</sup> a misunderstanding by the claimant on appeal that was caused by the defendant on appeal<sup>577</sup>
- the special nature of the proceedings.<sup>578</sup>

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<sup>565</sup> Asser Procesrecht/Van Schaick 2 2011/177.

<sup>566</sup> Art. 130(1) Code of civil procedure.

<sup>567</sup> Art. 130(2) Code of civil procedure.

<sup>568</sup> Art. 130(3) juncto Art. 120(3) Code of civil procedure.

<sup>569</sup> Art. 129 Code of civil procedure.

<sup>570</sup> Art. 353 juncto Art. 129 and 130 Code of civil procedure; F.B. Bakels, A. Hammerstein & E.M. Wesseling-van Gent, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht, Procesrecht, IV, Hoger beroep*, Deventer, Kluwer, 164 (hereinafter Asser Procesrecht/Bakels, Hammerstein & Wesseling-van Gent 4 2012).

<sup>571</sup> Supreme Court 20 June 2008, NJ 2009/21.

<sup>572</sup> Supreme Court 19 June 2009, NJ 2010/154; see also Supreme Court 23 September 2011, LJN BQ7064 (Pessers/Ru-Pro Holding), Supreme Court 9 December 2011, LJN BR2045 (Doornenbal) and Supreme Court 12 April 2012, LJN BV1301 (De Beeldbrigade), JBPR 2012/33, 34 and 43.

<sup>573</sup> Asser Procesrecht/Bakels, Hammerstein & Wesseling-van Gent 4 2012/160.

<sup>574</sup> Supreme Court 19 June 2009, NJ 2010/154; Asser Procesrecht/Bakels, Hammerstein & Wesseling-van Gent 4 2012/107.

<sup>575</sup> Asser Procesrecht/Bakels, Hammerstein & Wesseling-van Gent 4 2012/107.

<sup>576</sup> Supreme Court 19 June 2009, NJ 2010/154; Asser Procesrecht/Bakels, Hammerstein & Wesseling-van Gent 4 2012/107.

<sup>577</sup> Asser Procesrecht/Bakels, Hammerstein & Wesseling-van Gent 4 2012/107.

<sup>578</sup> Supreme Court 19 June 2009, NJ 2010/154; Asser Procesrecht/Bakels, Hammerstein & Wesseling-van Gent 4 2012/107.

#### **Section IV. Specific Instances**

##### **4.1. Identify any cases relating to damages claims for infringements of competition law and explain how interest was calculated. In writing these summaries, provide all relevant information about how interest and other compensation for the effluxion of time was calculated.**

(NL.34) Although there are quite some private enforcement cases in the Netherlands only few cases reached the stage of a decision on interest.

Court Oost-Nederland 16 January 2013, ECLI:NL:RBONE:2013:BZ0403<sup>579</sup> confirmed (except on points relating to the passing-on defense) by Court of Appeal Arnhem-Leeuwarden 2 September 2014, ECLI:NL:GHARL:2014:6766<sup>580</sup>

The case concerns a follow-on action in relation to the Gas Insulated Switchgear cartel. By decision dd 24 January 2007<sup>581</sup> the Commission fined a number of undertakings including ABB Ltd for an infringement of Art. 81 EC Treaty. ABB Ltd holds via ABB Holding all the shares in ABB B.V.

TenneT TSO B.V. is the legal successor of SEP. Saranne B.V. Saranne is 100% owned by TenneT TSO B.V.

TenneT's legal predecessor bought gas insulated switch gear from ABB, B.V.'s legal predecessor during the cartel period.

Sep purchased gas insulated switch gear from ABB in the second half of 1992. Payments were made by Sep

TenneT and Saranne claim damages from ABB Ltd. and ABB B.V. for the overcharge paid by Sep.

TenneT and Saranne are recognized as rightful claimants.

Both ABB Ltd. and ABB B.V. are held liable for the damage their participation in the cartel caused to the TenneT's legal predecessor. ABB Holding is not held liable.

The first instance court refuses the passing-on defence. The determination of the damage is referred to a later procedure (schadestaat procedure). There is no decision on interest relating to the damages. There is however a decision in relation to interest on the procedural costs. Since judgement was given against ABB Ltd. and ABB B.V., they are held liable for the procedural costs incurred by TenneT and Saranne. Insofar as the claim was directed against ABB Holding, judgment was given against TenneT and Saranne who are held liable for the procedural costs incurred by ABB Holding. (Legal) Interest on the procedural costs run as of the 15th day after the day of the judgment until full payment.

On appeal the decision is confirmed except as regards the passing-on defence, which is in principle recognized. Since both parties brought on appeal claims that were withheld and claims that were rejected, each party bears its own procedural costs relating to the appeal.

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<sup>579</sup> Rechtspraak.nl, JOR 2013/129, note B.M. Katan, NJF 2013/138, Ondernemingsrecht 2013/55, note B.J. Drijber, RO 2013/35, JONDR 2013/543.

<sup>580</sup> Rechtspraak.nl, JOR 2014/265 note B.M. Katan and J.S. Kortmann, NJF 2014/461, JONDR 2014/1028.

<sup>581</sup> Case COMP/F/38.899.



**Court Gelderland 10 June 2015, ECLI:NL:RBGEL:2015:3713<sup>582</sup>**

This decision is the follow-up decision to the previous ones; it concerns the actual damages award in the TenneT case.

TenneT claimed compound legal interest on the overcharge as of the payment dates. These are seven different dates since the price was paid in seven installments. TenneT stated that bank statements are no longer available after 20 years and cannot be obtained from the bank either. It does however still have the invoices and it claims that with some exceptions it can be held to have paid the invoices on the first Thursday or Friday on or after the payment period of 30 days after the invoice date. TenneT spreads the overcharge proportionally over the installments.

Alstom c.s. claimed that TenneT fails to deliver the required proof regarding the dates of payment and that TenneT even seems to indicate that it always paid too late. Alstom therefore finds that the interest claim should be denied. Moreover, it considers that a large part of the interest claim is time barred. According to Alstom c.s. TenneT c.s. can only claim interest over the five year period preceeding the first action of interruption of the prescription.

The Court refutes the defence of prescription. It is a new defence on which Alstom c.s. has not relied until its last written pleadings to which TenneT could no longer respond. The Court considers the appeal to prescription in the ultimate written pleadings following an extensive written debate contrary to the principles of due process and of the concentration of defences in the answer conclusion. In that conclusion Alstom c.s. only claimed mitigation of the interest claim. It repeated this request in later written pleadings. In two consecutive written pleadings it did not address the interest claim at all. It did not address it either in two pleadings following on to an interim decision of 5 November 2014.

The Court takes into account that the stakes are high, interests on a significant sum of money over a period of about ten years which deserves the attention of both parties and of which Alstom c.s. was aware given its mitigation request. In the current late stage of the proceedings TenneT c.s. should not be surprised with such an invasive principal defence as an appeal on prescription. In addition TenneT c.s. should definitely be entitled to react to the appeal on prescription which is based on article 3:308 Civil Code since the interpretation of this Article by Alstom c.s. is for example difficult to reconcile with Directive 2014/104/EU (see Recital 12, where the Parliament and Council consider that the payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time and should be due from the time when the harm occurred until the time when compensation is paid). In addition, the Court takes into account the long duration of the proceedings which needs to be ended.

The Court agrees with Alstom c.s. that TenneT needs to prove when it made the payments. The consequence of the fact that TenneT fails to prove the exact dates of the payments is however not that its interest claim needs to be turned down entirely since it is not disputed that TenneT in fact paid all the invoices. In addition, the payment dates mentioned on the invoices are not disputed and it has not been proven or appeared that the payment dates have been exceeded significantly. It follows from the debate between the parties that the payment terms have been exceeded by at most a few days up to two weeks.

The spread of the overcharge over three various invoices was not disputed by Alstom c.s.

The Court therefore awarded compound **legal interest** as claimed by TenneT as of 14 days after the payment date. The Court furthermore considered the request to mitigate the legal interest not sufficiently substantiated since Alstom c.s. did not indicate why given the circumstances of this case, including the nature of the liability and the financial capacity of the

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<sup>582</sup> JONDR 2015/45, RO 2015/5.

parties, the award of the standard legal interest would lead to manifestly unacceptable consequences.

Note: The European Commission decided that ABB participated in the cartel between 15 April 1988 and 2 March 2004. Both the conclusion of the contract between SEP and ABB and the payments made by SEP took place after the entry into force of the New Civil Code. The Court considered the damage to occur at the moment the payments to SEP were made. As of that moment SEP's claim for damages arose and interests started to accrue. Since this moment was situated after the entry into force of the New Dutch Civil Code, the Court applied the rules of this Code, even though the infringement of the competition rules by ABB started before the entry into force of the new Dutch Civil Code.

**Court Leeuwarden 4 October 2006, ECLI:NL:RBL EE:2006:AY9814<sup>583</sup>**

Batavus, a producer of bicycles, had been supplying the claimant with bicycles for about 30 years. Under the influence of pressure exerted by one of the claimant's competitors Batavus terminated its commercial relationship with the claimant as of 31 December 2001. The Court held that the termination was the result of an agreement or a concerted practice between Batavus and the claimant's competitor and an infringement of Art. 6 of the Dutch competition act (the national equivalent of Art. 101 TFEU). As a result of a prohibited agreement or concerted practice, the Court considered the termination void on the ground of Art. 6(2) Dutch competition act or at least ineffective given the requirements of good faith and fair dealing. It held Batavus liable for the damage the claimant suffered as a result of the termination. The exact amount of the damage was still to be determined, but interest on the sum that was still to be determined would run as of 31 December 2001, the date of the illegal termination until full payment.

**4.2. Are the rules on the award of interest specific to the kinds of claim or general principles? Are there any specific approaches/rules that you can identify in national or EU competition cases, or in other cases where the claim is brought by business against business (B2B) and are there any specific approaches/rules in business versus consumer (B2C) cases?**

(NL.35) As required by the Late payments directive, there is a specific system for interest for late payments in commercial transactions. Damages due to an infringement of competition rules will however not qualify as late payments falling within this system. Therefore, the general regime of interest applies.

(NL.36) There are no different approaches regarding interest due in private enforcement cases in relation to B2B and B2C.

***Section V. Evaluation, Interpretation in conformity with EU Law, and Intertemporal Aspect***

**5.1. Throughout the reports, evaluate how satisfactory are the rules on the calculation of interest perceived to be? In considering this question, identify any law reform proposals in the last 15 years or so, or any major judgments by the higher courts that call into question or change some of the issues pertaining to the award of damages. Please identify changes of relevant national law on interest that will come into force or are currently considered.**

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<sup>583</sup> Rechtspraak.nl, NJF 2006, 630.

- (NL.37) The rules on the calculation of interests are generally perceived to be satisfactory, although some scholars recognize that reasons of fairness plead for awarding additional compensation if statutory interest does not cover all the damage suffered as a result of the late payment.<sup>584</sup> Since the introduction of the new Dutch Civil Code in 1992, the only statutory changes relating to the substantive rules on interest concerned the introduction of specific rules on late payment in commercial transactions, which however normally do not apply in private enforcement cases since the late payment that constitutes the remuneration for the provision of goods or services in B2B or business to government relations will normally not constitute an infringement of the competition rules (except perhaps when this occurs as a form of abuse of dominance). In addition, by means of administrative measures the way in which the (normal) legal interest is calculated has been changed.

The judgments mentioned under 3.4 limited the right to increase or amend a claim on appeal.

- (NL.38) There are currently no proposals to change the rules relating to interest. The Draft proposal of legislation implementing Directive 2014/104<sup>585</sup> provides that Article 3 of this Directive which contains the principle of full compensation and specifies that:

“Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest”

does not require specific implementation measures since these principles already form part of Dutch law. It is not certain, however, that the Court of Justice would accept that the abstract calculation of legal interest is sufficient in view of the principle of full compensation in cases where the claimant can prove that the damage he suffered as a result of late payment of compensation exceeds the abstractly calculated legal interest.

Recital 46 Directive 2014/104 states that

“In the absence of Union rules on the quantification of harm caused by a competition law infringement, it is for the domestic legal system of each Member State to determine its own rules on quantifying harm, and for the Member States and for the national courts to determine what requirements the claimant has to meet when proving the amount of the harm suffered, the methods that can be used in quantifying the amount, and the consequences of not being able to fully meet those requirements”,

taking into account of course principles of equivalence and effectiveness. This could plead in favour of allowing the Dutch system of abstract calculation of the legal interest. However, recitals are not binding legal rules. The Articles of the Directive are.

Article 17 Directive 2014/104 seems to take a more restrictive approach to the freedom that is left to the Member States when determining the quantum of the damages. It orders Member States to ensure that the national courts are empowered, in accordance with national procedures, to estimate the amount of harm, (but only)

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<sup>584</sup> Asser/Hartkamp & Sieburgh 6-II 2013/213.

<sup>585</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European, OJ L 349, 5.12.2014, p. 1–19.

“if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available”.

It is possible, however, that the Court of Justice will leave it to the appreciation of the national court to determine in view of the facts of the case and the surrounding circumstances whether in a specific case it is practically impossible or excessively difficult to quantify the harm suffered on the basis of the evidence available.

This provision may of course be interpreted in the light of Recital 46. Nevertheless, a national rule which categorically excludes, for legal reasons,<sup>586</sup> the claimant from proving that his loss resulting from the late payment exceeds legal interest, might well be considered to infringe Art. 3 Directive 2014/104.

**5.2. For each question, where it is relevant, assess the compliance of the national interest rules with the minimum standard prescribed by EU law (‘full compensation’). If national law does not grant full compensation, please try to identify an interpretation of national law that guarantees full compensation in conformity with European law.**

(NL.39) The starting point under Dutch law is full compensation. It is recognized however that it may be difficult to determine exactly what is full compensation in a specific case. Therefore, if the extent of the damage cannot be assessed exactly, the Courts are allowed in such cases to quantify damages abstractly or to estimate the damage (Art. 6:97 Civil Code).

(NL.40) With regard to interest specifically, the new Dutch Civil Code opted for an abstract determination of the damage caused by late payments of sums of money. Such damage only consists of legal interest, the rate of which is determined by means of administrative measures. Parties can only contractually agree on a higher interest rate. The creditor is not required to prove that he suffered loss as a result of the late payment, or that the loss he suffered as a result of the late payment exceeds the legal interest. Similarly, the debtor is not entitled to prove that the legal interest exceeds the creditor’s loss resulting from the late payment. The legal interest is the minimum and the maximum the creditor can obtain to compensate the damage he suffered as a result of late payment.<sup>587</sup>

(NL.41) This abstract calculation of the loss resulting from the late payment implies that there may be a difference between the actual loss suffered as a result of the late payment, and the compensation awarded therefore. The Dutch legislator preferred this solution in order to avoid difficulties resulting from the determination of these types of damages.<sup>588</sup> Authoritative scholars however recognize that reasons of fairness would plead for awarding additional compensation if statutory interest does not cover all the damage suffered as a result of the late payment (cf. *supra*, n° 37).

**5.3. Finally, when assessing the overall compliance of national law with the principle of full compensation based on directly applicable EU law, please confirm that national courts have to apply it also in relation to past infringements of EU competition law or the equivalent provisions of the EEA agreement (e.g. cartels starting in the 1990ies and ending in the 2000er years).**

<sup>586</sup> Cf. the wording in Case C- 557/12, Kone AG et al. v ÖBB-Infrastruktur AG, ECLI:EU:C:2014:1317.

<sup>587</sup> Supreme Court 14 January 2005, LJN AR0220, NJ 2007/481 (Ahold/Staat), Supreme Court 14 January 2005, LJN AR2760, NJ 2007/482 (Van Rossum/Fortis); W.A.K. Rank, T&C Burgerlijk Wetboek, comment on Art. 6:119 CC, (2015), n° 2.

<sup>588</sup> Asser/Hartkamp & Sieburgh 6-II 2013/213.

(NL.42) Directive 2014/104 needs to be implemented, i.e. the national provisions implementing the Directive need to be brought into force by 27 December 2016<sup>589</sup>. Member States are ordered to ensure that the national measures adopted in order to comply with the substantive provisions of the Directive do not apply retroactively.<sup>590</sup> The fact that the Directive includes the principle of full compensation does therefore not amount to a sufficient legal basis to apply this principle to infringements of competition law which took place before the entry into force of the implementation legislation, although there will be a duty for the national Courts to interpret the national legislation in conformity with the Directive as of the moment the Directive needs to be implemented. The interpretation which the Court of Justice might at a later date give to provisions of the Directive does not apply as such to the period before the Directive entered into force. However, to the extent that the right to compensation and the extent of the damages to which the claimant is entitled follows from the directly applicable provisions Art. 101-102 TFEU (and their precursors) it does apply to the period preceding the entry into force of the Directive and the implementation legislation. It follows therefore, that the statements the Court of Justice made in *Manfredi* regarding the extent of the right to damages apply to that period:

“In the absence of Community rules governing that field, it is for the domestic legal system of each Member State to set the criteria for determining the extent of the damages for harm caused by an agreement or practice prohibited under Article 81 EC, provided that the principles of equivalence and effectiveness are observed.

Therefore, first, in accordance with the principle of equivalence, if it is possible to award particular damages, such as exemplary or punitive damages, in domestic actions similar to actions founded on the Community competition rules, it must also be possible to award such damages in actions founded on Community rules. However, Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them.

Secondly, it follows from the principle of effectiveness and the right of individuals to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest“.<sup>591</sup>

(NL.43) Furthermore, it follows from *Kone*, that umbrella damage is a type of damage that qualifies for compensation where it is established that the cartel at issue was, in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently, and that those circumstances and specific aspects could not be ignored by the members of that cartel.<sup>592</sup>

#### **5.4. Regarding the secondary subject of investigation (interest on damages due to infringements of national competition law only) Recital 12 of the preamble of Directive 2014/104/EU summarises the EU law principles regarding interest as follows:**

“Anyone who has suffered harm caused by an infringement can claim compensation for the actual loss (*damnum emergens*), for the gain of which he has been deprived (loss of profit or *lucrum*

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<sup>589</sup> Art. 21 Directive 2014/104.

<sup>590</sup> Art. 22 Directive 2014/104.

<sup>591</sup> Joined cases C-295/04 to C-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04), *Antonio Cannito v Fondiaria Sai SpA* (C-296/04) and *Nicolò Tricarico* (C-297/04) and *Pasqualina Murgolo* (C-298/04) v *Assitalia SpA*, ECR 2006 I-06619.

<sup>592</sup> Case C- 557/12, *Kone AG et al. v ÖBB-Infrastruktur AG*, ECLI:EU:C:2014:1317.

cessans) plus interest. This is irrespective of whether the national rules define these categories separately or in combination. The payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time, and it should be due from the time the harm occurred until compensation is paid, without prejudice to the qualification of such interest as compensatory or default interest under national law. This is also without prejudice to whether effluxion of time is taken into account as a separate category (interest) or as a constituent part of actual loss of profit. It is incumbent on the Member States to lay down the rules to be applied for that purpose”.

Would the right to full compensation as set out by Recital 12 of the proposed directive apply to interest calculation for damages in cases where only national competition law has been infringed and the damage occurred before the implementation of the directive came into force?

The normal rules on legal interest, as set out above apply. The starting point under Dutch law has always been full compensation, albeit that regarding interest an abstract calculation is applied which may result in compensation that differs from the actual loss suffered.

If the application of the rules of the Directive would lead to a result that differs from the application of Dutch law and the Netherlands would have made the rules of the Directive applicable also to purely national cases, the rules of the Directive would also apply to purely national cases where the damage arose before the Directive came into force, but the interest relates to a period after the Directive and the implementation legislation came into force. If there would be a gap between the entry into force of the Directive and that of the implementation legislation, the national rules would need to be interpreted in the light of the Directive as far as this period is concerned. The current Dutch draft of the act implementing the Directive does not deal with purely internal cases. A separate draft is planned to make the rules of the Directive applicable to purely international cases. The Dutch legislator considers that its interest rules do not need to be amended in the light of the Directive, but in the end it is the Court of Justice that has the final word on the interpretation of the interest rules under the Directive and on whether Dutch law complies therewith.



## Portugal

Miguel Sousa Ferro\*

### *Preliminary Matters*

- (PT.1) In Portugal, there have been court rulings in stand-alone antitrust private enforcement actions since the end of the 1980s. Only recently have there been examples of follow-on suits (four are known), none of which have yet been concluded (one was deemed time-barred).
- (PT.2) Quantitatively, private enforcement of competition law in Portugal has been rather limited, with an average of little over 1,5 cases per year. While the traditional type of case (small disputes in vertical relations) seems to have continued, there is a noticeable recent trend for a new type of private enforcement cases, with much higher figures being involved (millions of EUR). Worthy of note is the recent appearance of antitrust private enforcement through arbitration and the initiation of the first mass damages claim through the institute of *actio popularis* (opt-out), promoted by an NGO in a partly follow-on framework.<sup>593</sup>
- (PT.3) So far, there have been only 3 cases where competition rules have resulted in a monetary advantage being awarded to one of the parties, but only one of them can arguably be called compensation. In two cases, one party was ordered to return sums illegally received from the other, as a result of contractual clauses being deemed in violation of competition law and, therefore, null and void<sup>594</sup>. Another case is pending where the same type of situation is under discussion.<sup>595</sup> In one case, appealed to the last instance, the Supreme Court awarded EUR 50.000 in damages for an abuse of economic dependence (under national competition law). The damages being compensated and method of calculation were unclear, and based on equity.<sup>596</sup>
- (PT.4) In none of the above-mentioned cases was the issue of interest on damages discussed. However, in at least three of the actions that are presently pending, the applicant has asked for interest on damages. This includes an arbitral award, now before the Lisbon Appeal Court, in

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<sup>593</sup> See ROSSI, L., SOUSA FERRO, M., “Private Enforcement of Competition Law in Portugal (I): An Overview of Case-Law”, (2012) III(10) *Revista de Concorrência e Regulação* 91; and SOUSA FERRO, M., “Collective redress: Will Portugal show the way?”, (2015) 6 *Journal of European Competition Law & Practice* 299.

<sup>594</sup> See: Lisbon Appeal Court Judgment of 24/11/2005, *Carrefour v. Ores Dois* (6882/2005-8); and Lisbon Appeal Court Judgment of 03/04/2014, *ANF v. IMS Health* (672/11.0YRLSB – appeal from an arbitral award).

<sup>595</sup> See: Lisbon Judicial Court, *Optimus v. Portugal Telecom* (1774/11.9TVLSB).

<sup>596</sup> See: Supreme Court of Justice Judgment of 20/06/2013, *Dealer v. Toyota* (178/07.2TVPRT.P1.S1). As much as can be made out from the judgment, the courts awarded compensation for abuse of economic dependence, not because of the direct damages this caused or loss of profit (which was analyzed separately), but because of “indirect damages”, specifically the “fraudulent frustration of the expectations of the applicant”. The Supreme Court increased the amount set in the lower courts and specified that it was not particularly concerned with assessing the correspondence of that amount to actual damages.



which the arbitral tribunal was asked to award interest for damages arising from an infringement of competition law<sup>597</sup>.

- (PT.5) It also includes the *Optimus v Portugal Telecom* case, in which the applicant, as per usual practice of Portuguese lawyers, merely asked for delay interest starting from the date of the notification of the defendant relating to this suit.<sup>598</sup> In a sibling case, which was deemed time-barred, the applicant had similarly sought delay interest, but it also asked for the payment of “amounts corresponding to capital cost”, in terms which were to be determined in the judgment’s liquidation phase.<sup>599</sup>
- (PT.6) Finally, in the more recent *COGECO v Sport TV* case, the applicant has asked for damages accrued by: (a) interest corresponding to the opportunity cost of the capital which was not available to it as a result of the infringement, from the moment of the infringement to the moment of notification of the defendant (remuneration of capital calculated according to profitability of Bank of Portugal treasury bonds); and (b) legal interest, from the moment of notification until complete payment.<sup>600</sup> Another case which is pending may also give rise to important clarifications, as it relates to a mass damages opt-out case, potentially representing *circa* 3 million clients of pay-tv in Portugal. However, in this case, the applicant NGO asked that the obligation to compensate be determined in a first phase, and that damages be discussed and quantified only in an eventual second phase (liquidation).<sup>601</sup>
- (PT.7) In short, in Portugal there are no precedents of calculation of interests on damages arising from infringements of competition law. Since the issue is governed by general civil law rules, answers can be sought in case law relating to other subject matters. However, even an extension of the scope of analysis is not particularly helpful, as there is a great level of legal uncertainty and doctrinal debate as to the type of interest on damages which can be claimed, the initial moment and the method of precise quantification.<sup>602</sup>
- (PT.8) Legal uncertainty is aggravated by a stark disparity between the possibilities that exist according to legal doctrine and the reality of legal practice. Law Professors seem to unanimously agree that parties are entitled to interest on damages since the moment the damage occurred, in such a way that will allow the restoration, insofar as possible, of the situation which would have existed in the absence of an infringement. However, in the case of tort actions, Portuguese practitioners tend to apply only for legal interest (“*juros de mora*”) from the date of the notification of the action, implicitly renouncing their right to seek interest for damages before that moment.
- (PT.9) Procedural issues relating to private enforcement are not governed or affected by the Portuguese Competition Act (Act 19/2012, of 8 May). There are no special rules affecting the calculation of interest in antitrust private enforcement actions. The general rules of the Civil Code and of the Code of Civil Procedure are applicable. The same set of national rules applies to private enforcement actions under EU competition law and under national competition law.

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<sup>597</sup> As the Lisbon Appeal Court judgment has not yet been adopted, no public source is yet available on this judgment.

<sup>598</sup> See: Lisbon Judicial Court, *Optimus v. Portugal Telecom* (1774/11.9TVLSB).

<sup>599</sup> See: Lisbon Appeal Court Judgment of 31/10/2013, *Onitelecom v. Portugal Telecom* (2271/11.8TVLSB.L1-8).

<sup>600</sup> See: Lisbon Judicial Court, *Cogeco v. Sport TV* (5754/15.7T8LSB).

<sup>601</sup> See: Lisbon Judicial Court, *Observatório da Concorrência v. Sport TV* (7074/15.8T8LSB).

<sup>602</sup> As cartels often concern damages that occurred a relatively long time ago, questions of limitation period (time-barring) will frequently arise but will not be covered in the report.

(PT.10) Jurisdiction for private enforcement actions rests with the common courts, and territorial competence is determined by general rules. Differently from appeals of decisions of the Portuguese Competition Authority, which have been concentrated in the specialized Competition, Regulation and Supervision Court (in Santarém), literally hundreds of different judges in courts all over the country can be called to apply competition law in private enforcement actions. 2<sup>nd</sup> instance appeals are also not concentrated, with any of the 5 Appeal Courts being competent, depending on territorial jurisdiction. 3<sup>rd</sup> instance appeals, when available, are submitted to the Supreme Court of Justice.

## **Section I. General Principles**

### **1.1. What is interest? Is there a definition?**

(PT.11) There is no general statutory definition of interest. Several definitions may be found in the case law and in doctrine. According to one definition, “interest [“juros”] corresponds to the civil fruits made up of fungible things, representing the yield of an obligation to pay an amount of capital. (...) Interest is, therefore, a remuneration of a third person’s capital, varying in accordance with three parameters: the value of the capital; the time during which that capital is used by or available to the person holding the obligation; and the rate, determined by law or agreed between the parties. In this sense, the interest is the compensation the debtor continuously pays for the use or simply for the temporary availability of capital made up of money or of other fungible things and which is expressed in a previously determined or determinable fraction of the amount owed”.<sup>603</sup>

(PT.12) The Portuguese Civil Code and the national case law (as well as doctrine) include several categorizations of interest.

(PT.13) “Legal” interest is distinguished from “conventional” (or contractual, or voluntary, or agreed) interest: the latter is a rate of interest agreed upon between the parties, whereas the first is a rate of interest determined in law and applicable by legal imperative or in the absence of a determination of this issue by the parties.<sup>604</sup>

(PT.14) “Remunerative” interest is an onerous payment agreed upon between the parties in exchange for the availability of the capital in question during the time it is available to the other party.<sup>605</sup>

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<sup>603</sup> Judgment of the Lisbon Court of Appeal of 17 February 2011 (case no. 83130-A/1995.L1-2).

<sup>604</sup> See, e.g.: Arts. 559 and 806 of the Civil Code.

Article 559 of the Civil Code: “1. *Legal interest and interest stipulated without specifying rate or amount are those determined in a ministerial order issued jointly by the Ministers of Justice and Finance.*

2. *The stipulation of interest in a rate above the one set in accordance with the previous number must be done in writing, or only the amount up to legal interest will be owed”.*

Article 806 of the Civil Code: “1. *In the case of pecuniary obligations, compensation is owed in the amount of interests counted from the day when the delay [mora] begins.*

2. *The interest which is owed is legal interest, unless if before the delay a higher interest is owed or the parties agreed a higher delay interest than the legal one.*

3. *The creditor may, however, prove that the delay [mora] caused him/her/it more damages than those resulting from the [legal delay] interest provided for in the previous number and demand the corresponding additional compensation, when liability for an unlawful action or for risk is at stake”.*

<sup>605</sup> See, e.g.: Judgment of the Supreme Court of 24/05/2007 (case no. 07A930).

- (PT.15) “Delay” interest is meant to compensate damages arising from the delay in complying with an obligation.<sup>606</sup>
- (PT.16) Courts also recognize the category of “compensatory” interest, which are meant to repair damages caused by the unavailability of a certain amount, the rate thereof being variable and presumably linked to the variation of interest rates at which financing is available.<sup>607</sup> But it should be noted that there seems to be some different understandings of these issues. Fundamentally, while all courts will, in principle, be willing to discuss compensation of damages prior to the notification of the suit (after which it is clear that “delay” interest can be sought), it is not clear that not all would think of part of those damages in terms of “compensatory” interest.
- (PT.17) There was, for some time, an important split in Portuguese case-law regarding the purpose of delay interest and the possibility of updating the amount of the compensation to take into account inflation. The Supreme Court adopted a judgment binding upon all courts in which it laid down a specific view of the purpose of delay interest.<sup>608</sup> One school of thought argued that it should be possible to update the amount to take into account inflation and to apply delay interest on top of the updated amount, because delay interest is meant to compensate the injured party for the delay. But the opinion upheld by the Supreme Court was that delay interest is fundamentally meant to counteract inflation, and therefore the two cannot be cumulated. As a result of this judgment, parties may request that the amount of the compensation be updated to take into account inflation, but they can only ask for delay interest after the time in relation to which that update has been carried out. In certain cases, parties may thus be faced with a choice, for a certain period, between asking for update for inflation or delay interest, but cannot ask for both for the same period.
- (PT.18) It should therefore be kept in mind that, at least according to some doctrine and case law, an updating of the amount owed to take into account inflation may not be considered a payment of interest. And, as previously mentioned, it may also be argued that, although parties can, under certain conditions, claim a remuneration of capital corresponding to the opportunity cost of its unavailability during a certain period of time prior to that when delay interest could be claimed, it is not entirely clear that such a claim would be qualified as a claim for the payment of interest.
- (PT.19) Interest may also be “civil” or “commercial”, depending on the nature of the persons party to the obligation in question.<sup>609</sup> Different rates correspond to each.

**1.2. When, and under what conditions, is interest payable at all? Does this depend on whether the claim is brought in tort, breach of contract or (where applicable) restitution/unjust enrichment?**

- (PT.20) Some differences are inevitable, as claims brought for breach of contract may give rise to agreed upon interest, whereas this would not occur in tort claims. That being said, the law makes no distinction between the interest payable depending on whether the claim is brought in tort, breach of contract or restitution/unjust enrichment, as such.

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<sup>606</sup> See, e.g.: Judgment of the Supreme Court of 24/05/2007 (case no. 07A930).

<sup>607</sup> See, e.g.: Judgment of the Supreme Court of 08/05/2013 (case no. 033/13).

<sup>608</sup> See, e.g.: Judgment of the Supreme Court uniformizing jurisprudence no. 4/2002.

<sup>609</sup> See, e.g.: Art. 559 of the Civil Code and Art. 102 of the Commercial Code.

- (PT.21) The moment from which interest is payable depends on the notion of interest used and on the characteristics of the situation, as will be further described below.
- (PT.22) This being said, there is room for some legal controversy in the interpretation of the applicable rules, where tort claims are concerned. Article 804(2) of the Civil Code states that there is a delay in complying with the obligation of payment (the debtor is in “mora”) “when, for a reason that is imputable to him, the payment, which is still possible, was not carried out in its due timing”.
- (PT.23) As a rule, under article 805(1), the debtor is only in “mora”, after he has been formally requested to pay the amount owed, through the court or not. However, one of the exceptions, foreseen in article 805(2)(b), is the case of an obligation arising from an infringement of the law. So, at first glance, it might be argued that tort liability for antitrust infringements would include the right to delay interest from the time of the infringement. But this does not seem to be the case (when it comes to legal delay interest), because article 805(3) adds: “If the credit is not liquid, there is no «mora» as long as it does not become liquid, unless that absence of liquidity is attributable to the debtor; however, in the case of liability for an unlawful fact or for risk, the debtor is in «mora» from the moment of notification, unless he is already in «mora» before, according to the first part of this clause”.
- (PT.24) In principle, most claims for damages arising from antitrust infringements will not be “liquid”. There will generally be no clarity on the amount owed – or claimed – before a suit is brought (and even then, the amount will most certainly be subject to dispute). Thus, notwithstanding the possibility of seeking compensation for prior damages, it seems reasonable to conclude that tort claims for antitrust infringements can only include legal delay interest after the moment of notification of the suit.

### **1.3. Is payment of interest compulsory or at the discretion of the court?**

- (PT.25) According to article 609 of the Code of Civil Procedure, the court may not sentence the parties to pay an amount higher than that which was requested. Infringement of this rule makes the judgment null and void (article 615(1)(e) of the Code of Civil Procedure). Consequently, according to what appears to be the dominant interpretation, the court cannot award interest *ex officio*. Even a change in the type of interest which has been awarded, when it leads to greater rate of interest (e.g., the court awarding commercial, instead of civil interest) is deemed unlawful.<sup>610</sup>

### **1.4. What is said to be the purpose of the interest payment?**

- (PT.26) The answer to this question depends on what is understood as interest. As previously mentioned, the Supreme Court has determined, with binding force, that delay interest is meant, at least to a large degree, to make up for the effects of inflation, which is somewhat limiting of its role as a tool for compensation, and certainly excludes any possible punitive function. On the other hand, the legal interest rate is higher than the rate of inflation, which means there must be a degree of compensation involved beyond mere compensation for inflation.

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<sup>610</sup> See, e.g.: Judgment of the Lisbon Appeal Court of 26/11/2009 (case no. 996/05.6TCLRS.L1-6).

(PT.27) In any case, regardless of conceptualization, the law clearly states:

“whoever is obliged to repair a damage, must reconstitute the situation which would exist, if the event creating the obligation of reparation had not occurred”;<sup>611</sup>

“the obligation to compensate exists only in relation to those damages which the injured party probably would not have had in the absence of the offence”;<sup>612</sup>

“the duty to compensate includes not only the damage caused, but also the benefits which the injured party did not obtain, because of the offence”;<sup>613</sup>

“in determining the amount of compensation, the court may take into account future damages, as long as they are foreseeable; the determination of the respective compensation will be postponed for a later date”;<sup>614</sup>

“notwithstanding other provisions, compensation in cash is measured by the difference between the patrimonial situation of the injured party, at the most recent date which can be taken into account by the court, and the one which would exist on that date if the damages had not occurred”;<sup>615</sup>

“if the exact amount of the damages may not be determined, the court will adjudicate on the basis of equity, within the limits it deems suitable”.<sup>616</sup>

**1.5. What is the legal basis for the payment of interest (statutes, contractual agreements, case-law, soft law guidance)?**

(PT.28) The legal basis for the payment of interest is to be found in statute, specifically in articles 562 to 566 and 805 to 806 of the Civil Code, and in article 102 of the Commercial Code (when applicable).

***Section II. Calculation of Interest***

**2.1. What is the rate of interest that is set? How is it arrived at? Are there statutes?**

(PT.29) The rate of legal interest depends on whether the interest owed is “civil” or “commercial”. Commercial interest applies when the holder of the credit in question is a commercial undertaking (individual or legal person).

(PT.30) Under article 559(1) of the Civil Code, the rate of legal interest is determined by a joint Order of the Ministers of Justice and Finance.

(PT.31) The legal rate of civil interest has evolved as indicated in the following table:

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<sup>611</sup> Article 562 of the Civil Code.

<sup>612</sup> Article 563 of the Civil Code.

<sup>613</sup> Article 564(1) of the Civil Code.

<sup>614</sup> Article 564(2) of the Civil Code.

<sup>615</sup> Article 566(1) of the Civil Code.

<sup>616</sup> Article 566(1) of the Civil Code.

Table 1: Legal rate of civil interest

Period in force	Rate	Legal basis
05/08/1980 to 22/05/1983 (1021 days)	15%	Decree-Law 200-C/80, of 24/06; Ministerial Order 447/80, of 31/07
23/05/1983 to 28/04/1987 (1437 days)	23%	Ministerial Order 581/83, of 18/05
29/04/1987 to 29/09/1995 (3076 days)	15%	Ministerial Order 339/87, of 24/04
30/09/1995 to 16/04/1999 (1295 days)	10%	Ministerial Order 1171/95, of 25/09
17/04/1999 to 30/04/2003 (1475 days)	7%	Ministerial Order 263/99, of 12/04
From 01/05/2003...	4%	Ministerial Order 291/03, of 08/04

(PT.32) Under article 102(3) of the Commercial Code, the rate of “commercial” legal interest is determined by a joint Order of the Ministers of Justice and Finance, the latter of which is Ministerial Order 277/2013, of 26/08. This rate is revised every semester and is set, most recently, by adding 7% to the interest rate practiced by the ECB. For sake of clarity, a Notice is published indicating the rate every semester.

(PT.33) Ever since 2013, as a result of the transposition of Directive 2011/7/EU by Decree-Law 62/2013, there are two rates of “commercial” legal interest. The second, highest rate, will, in principle, not be relevant for the private enforcement of competition law, given the scope of Decree-Law 62/2013 (article 2). This regime is not meant to apply to tort liability.

(PT.34) This rate has evolved as shown in the following table:

Table 2: Commercial legal interest rates

1 <sup>st</sup> semester 2015	8,05%	Notice 563/2015, 19/1 (operations subject to DL 62/2013)
	7,05%	Notice 563/2015, 19/1 (others)
2 <sup>nd</sup> semester 2014	8,15%	Notice 8266/2014, 16/7 (operations subject to DL 62/2013)
	7,15%	Notice 8266/2014, 16/7 (others)
1 <sup>st</sup> semester 2014	8,25%	Notice 1019/2014, 24/1 (operations subject to DL 62/2013)
	7,25%	Notice 1019/2014, 24/1 (others)
2 <sup>nd</sup> semester 2013	8,50%	Notice 11617/2013, 17/9 (operations subject to DL 62/2013)
	7,50%	Notice 10478/2013, 23/8 (others)
1 <sup>st</sup> semester 2013	7,75%	Notice 594/2013, 11/1
2 <sup>nd</sup> semester 2012	8,00%	Notice 9944/2012, 24/7

1 <sup>st</sup> semester 2012	8,00%	Notice 692/2012, 17/1
2 <sup>nd</sup> semester 2011	8,25%	Notice 2284/2011, 14/7
1 <sup>st</sup> semester 2011	8,00%	Notice 2284/2011, 21/1
2 <sup>nd</sup> semester 2010	8,00%	Order 13746/2010, 12/7
1 <sup>st</sup> semester 2010	8,00%	Order 597/2010, 11/1
2 <sup>nd</sup> semester 2009	8,00%	Notice 12184/2009, 10/7
1 <sup>st</sup> semester 2009	9,50%	Notice 1261/2009, 14/1
2 <sup>nd</sup> semester 2008	11,07%	Notice 19 995/2008, 14/7
1 <sup>st</sup> semester 2008	11,20%	Notice 2152/2008, 28/1
2 <sup>nd</sup> semester 2007	11,07%	Notice 13665/2007, 30/7
1 <sup>st</sup> semester 2007	10,58%	Notice 191/2007, 5/1
2 <sup>nd</sup> semester 2006	9,83%	Notice 7705/2006, 10/7
1 <sup>st</sup> semester 2006	9,25%	Notice 240/2006, 11/1
2 <sup>nd</sup> semester 2005	9,05%	Notice 6923/2005, 25/7
1 <sup>st</sup> semester 2005	9,09%	Notice 310/2005, 14/1
01/10/2004 to 31/12/2004	9,01%	Notice 10 097/2004, 30/10
17/04/1999 to 30/09/2004	12%	Ministerial Order 262/99, 12/4

(PT.35) Both these legal interest rates only apply after the moment of delay in payment (“mora”). However, as explained above, full compensation may further require the consideration of the remuneration of the capital that was unavailable to the claimant during a certain period due to the infringement of competition law, even before there was technically “mora”.

(PT.36) Together with general principles of civil procedural law, such as the right of access to justice and the interdiction of *probatio diabolica*, the above-mentioned legal framework, especially article 566 of the Civil Code, suggests that courts may deem it appropriate to use central bank interest rates<sup>617</sup> as a measure for a reasonable remuneration of capital. Whenever EU competition law is applicable, this solution may also be required, depending on the specific case, by the application of the principle of effectiveness as affirmed in EU case law and in Directive 2014/104/EU.

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<sup>617</sup> For Bank of Portugal interest rates prior to 1995, see: <https://www.bportugal.pt/pt-PT/Estatisticas/PublicacoesEstatisticas/SLEPort/Publicacoes/sl-emf-txjuro.pdf>. For Bank of Portugal statistics on interest rates after 1995, see: [http://www.bportugal.pt/EstatisticasWEB/\(S\(cy5xibu3tp2si3tendowb3g\)\)/Default.aspx](http://www.bportugal.pt/EstatisticasWEB/(S(cy5xibu3tp2si3tendowb3g))/Default.aspx)

**2.2. Is interest simple or compound? If the interest is neither simple nor compound as defined above, please elaborate.**

(PT.37) As a rule, Portuguese law prohibits compound interest (“anatocismo”), as is clearly stated in article 560 of the Civil Code. The only exception allowed is not, in principle, relevant for the private enforcement of competition law: the parties to the dispute may agree, *ex post facto* (i.e., after the interest is owed) to allow for compound interest.<sup>618</sup>

(PT.38) It should be noted, however, that, while this clearly excludes compound interest for delay interest, it may be argued that this need not necessarily prevent the argument that the remuneration of the capital should be calculated in a compound manner, if this is necessary to guarantee “full compensation”.

**2.3. What is the time for which interest is calculated? When does interest start to accrue, when does the accrual of interest end? Are there any situations where the action of the plaintiff, for example delay on his part, serves to change the time for which interest is calculated? Are there provisions for suspension of the accrual of interest?**

(PT.39) See above 1.2. Delay interest will typically start to run only from the moment of notification, until effective and full payment.

**2.4. Are there any specific provisions if payment is requested in a different currency than that in the state where the lawsuit is brought? (e.g. a Swedish company claims for damages resulting from an EU-wide cartel against a German cartel member in Germany. Can the court award only EUR or also Swedish Krona?)**

(PT.40) The issue is not specifically regulated. In theory, nothing prevents the amount of compensation from being calculated or requested in a different currency. However, for the purposes of determining the value of the cause (which has direct procedural consequences), the amount must be calculated in EUR (see article 296 *et ss.* of the Code of Civil Procedure). The national rules for the determination of court costs are also in EUR.

**2.5. As damage claims for infringements of EU competition rules often pertain to long-running infringements, please include all applicable interest rates and the date the rate came into force from 1 January 1985 until today. Unless impossible due to national peculiarities, the rates should be listed in a two column table, containing the rate and the date it came into force. This should be accompanied by a legal retrospective that sets out any other changes to the relevant interest regime (e.g. the time interest starts to run, etc.) which occurred over this period, in order to allow a determination of which rules applied at a given point in time between 1 January 1985 and today.**

See 2.1 above.

**2.6. Please identify an official, reliable, publicly available source that publishes the pertinent legal interest rates as they change.**

(PT.41) If and when they are changed, both the civil and commercial interest rates are determined by Ministerial Orders, published in the Official Gazette ([www.dre.pt](http://www.dre.pt)).

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<sup>618</sup> See, e.g.: Lisbon Appeal Court Judgment of 17/02/2011 (case no. 83130-A/1995.L1-2).



- (PT.42) The evolution commercial interest rate (varying in relation to the ECB interest rate) can be followed through the Notices published by the Ministry of Finance: <http://www.dgtrf.pt/avisos-e-circulares/taxas-de-juros-moratorios/>

**2.7. If interest rates change on a fixed schedule, please indicate the schedule.**

- (PT.43) The civil interest rate is not changed on a fixed schedule and tends to be stable. The commercial interest rate is revised every semester, and is calculated by adding 7% to the ECB interest rate. The Ministry of Finance publishes a Notice with the new figure every semester, for the sake of legal certainty.

**2.8. If part of the debt / the damage is being paid, how is interest calculated following that payment? In particular, do partial payments first cover interest or the principal amount? Is there any provision or legal practice similar to Art. 86(3)(2) of the rules of application of Regulation 966/2012 on the financial rules applicable to the general budget of the Union where it is stated that “Any partial payments shall first cover the interest”?**

- (PT.44) The issue is not specifically regulated. In principle, the court treats the amount awarded (as compensation or restitution and interest) as a whole. There seems to be no legal basis that requires or allows for this type of distinction in the case of partial payment.

**2.9. Please calculate interest in the following hypothetical case. All dates are given in the format dd.mm.yyyy. All amounts are stated without specifying the currency to abstract from implications of the introduction of the common Euro currency. Assume that the claims have not been time barred. Assume that a national court in the Member State on which you are reporting has jurisdiction to rule on the case. Assume that the cartelists are jointly liable for the damage caused by the cartel. If results differ materially depending on whether accrual of interest is based purely on national law or made in compliance with the EU principle of full compensation, provide both calculations.**

There was a long running pan-European cartel for a product that materially affected trade between Member States. The cartel lasted from the beginning of 1993 until the dawn raids (unannounced inspections) of the European Commission on 02.02.2009.

On 30.11.2010, a longtime customer of the cartel, who bought the cartelised product in the Member State on which you are reporting, brings a claim for damages against three cartelists (A, B, and C). All of the three defendants have their seat in the Member State on which you are reporting. The customer only bought the cartelised product of the cartelists A and B. In the writ, the claimant specifies the damages caused by the cartel and the date on which the respective damage occurred. The claimant also specifically requests that interest be paid on the damages. The damages (always = 100) and respective dates are set out in Table 2 below. Should a subjective rate be of relevance, you will find the ROI (Return On Investment) rates of the claimant and the three defendants in Table 3 below. You will also find the average interest rate that the claimant had to pay on credit taken out in that year (claimant's average refinancing rate).

On 26.11.2013 a court renders a final judgment, ordering the defendant(s) to pay damages and interest. The defendants take until 12.02.2014 to pay. Please specify the total amount the jointly liable defendants have to pay on 12.02.2014 in order to relinquish their debt towards the claimant.

Table 3 - Damage Amounts and Dates for the hypothetical

Date the damage occurred	Damage amount
15/11/1993	100
17/09/1996	100
22/02/2006	100
12/08/2008	100

Table 4 - Refinance and Return on Investment Rates for the hypothetical

Year	Claimant's Refinance Rate	Claimant's Annual ROI	Defendant's A Annual ROI	Defendant's B Annual ROI	Defendant's C Annual ROI
1993	6.00%	5.50%	4.00%	4.00%	3.00%
1994	6.00%	9.80%	4.00%	4.00%	4.00%
1995	6.00%	9.50%	4.00%	4.00%	5.00%
1996	6.00%	1.00%	0.00%	0.00%	0.00%
1997	8.00%	-3.80%	1.00%	1.00%	3.00%
1998	8.00%	1.10%	4.00%	4.00%	5.00%
1999	8.00%	2.80%	1.00%	1.00%	3.00%
2000	8.00%	1.10%	-2.00%	-1.00%	0.00%
2001	8.00%	4.51%	2.00%	2.00%	3.00%
2002	8.00%	5.30%	4.00%	4.00%	5.00%
2003	8.00%	8.21%	9.00%	9.00%	9.00%
2004	7.00%	9.00%	3.00%	3.00%	2.00%
2005	7.00%	10.00%	1.00%	1.00%	1.00%
2006	7.00%	6.00%	1.00%	1.00%	1.00%
2007	5.00%	-5.00%	4.00%	4.00%	2.00%
2008	5.00%	-7.00%	-1.00%	0.00%	0.00%
2009	5.00%	-5.00%	2.00%	2.00%	4.00%
2010	5.00%	-3.00%	4.00%	4.00%	4.00%
2011	5.00%	-2.70%	4.00%	4.00%	2.00%
2012	5.00%	1.61%	-2.00%	-1.00%	0.00%
2013	5.00%	4.40%	8.00%	8.00%	7.00%
2014	5.00%	1.41%	-4.00%	-3.00%	-1.00%

(PT.45) The following tables present the possible calculations. Both regarding the period before and after the notification of the claim, there are several perceivable ways of calculating interest or, more generally, compensation for the period of time during which the claimant did not dispose of the capital.

(PT.46) Concerning the time before notification, a minimum standard is the offsetting of inflation. Thus, in relation to this period, it is possible to calculate interest on the basis of the inflation rate (compounding regime). This approach has the advantage of being simple to explain and to apply, plus having a high likelihood of acceptance by a national court.

(PT.47) On the other hand, in many cases, it is unlikely that this approach will allow meeting the legal standard for full compensation. Its main flaw is that it fails to take into account that, if the

amount in question had been available during the relevant period, it is possible that it would have been redirected towards other investments with greater returns, or that the undertaking would have been able to decrease the amount of financing it sought on the market. Either of these scenarios would mean that the inflation option would not place the injured party in the financial position that it would have been if the infringement had not taken place.

- (PT.48) There are several options to calculate a more realistic level of compensation, connected to return on investments or financing. One approach, which can be seen as conservative, is to use the Basic Interest Rate (Discount Rate) of the Banco de Portugal (before 1999) – see para. (PT.36), above –, or the ECB rate for its main refinancing operations (as of 1999).<sup>619</sup> As all commercial banks demand a premium on these rates, compound interest with the discount rate yields a low estimate of losses due to the unavailability of the capital, taking into account developments of the interest level in the market but avoiding any windfall profits of the claimant.
- (PT.49) Using the claimant's refinancing rate or internal rate of return also seems possible. These rates are highly individualised and therefore have the potential to more accurately reflect the position the claimant would be in, if the infringement had not occurred. However, using these rates will often raise serious burden of proof issues.
- (PT.50) In the example calculation below, calculations are provided, alternatively, with the inflation rates and the Central Bank rate for the time before the notification.
- (PT.51) For the time after notification of the claim, for the sake of brevity, calculations are provided only with the legal rate for civil delay interest (simple regime). However, to provide a more complete set of information, the final numbers that would result from employing the commercial rate of delay interest are also provided.

Table 5 – Interest owed based on inflation, until notification, for damage owed since 15/11/1993

From	To	Amount	Interest Rate	Total Days	Interest	Days in Year
15/11/1993	31/12/1993	100,00	6,80%	47	0,85	365
01/01/1994	14/11/1994	100,00	5,40%	318	4,69	365
15/11/1994	31/12/1994	105,54	5,40%	47	0,72	365
01/01/1995	14/11/1995	105,54	4,20%	318	3,85	365
15/11/1995	31/12/1995	110,11	4,20%	47	0,58	365
01/01/1996	14/11/1996	110,11	3,10%	319	2,97	366
15/11/1996	31/12/1996	113,66	3,10%	47	0,45	366

<sup>619</sup> The Banco de Portugal discount rate was in force until 31 December 1998. By definition, the discount rate was the interest rate on the basis of which the interest charged by Banco de Portugal to credit institutions was calculated. When the funds were provided against commercial liabilities previously accepted by credit institutions from their clients, the operation was called rediscount and the correspondent rate rediscount rate. It was a reference rate for public and private debt, and for legal and contractual purposes as well (for instance, calculation of remunerations and penalties for non-fulfilment of contracts).

The discount rate was set by Notice, published in the Republic Journal (“*Diário da República*”). The Banco de Portugal set the discount rate (Decree Law n.º 337/90\*, of 30 October, rectified by Decree Law n.º 231/95\*, of 12 September, Law n.º 3/96\*, of 5 February, and Law n.º 5/98\*, of 31 January). As of 1999, the ECB's rate for its main refinancing operations is the successor of the Banco de Portugal discount rate for most of the mentioned functions of the rate. As these rates are actually lower than conditions offered to non-financial institutions, they provide a lower bound estimate of the “cost of money” over time.

01/01/1997	14/11/1997	113,66	2,30%	318	2,27	365
15/11/1997	31/12/1997	116,38	2,30%	47	0,34	365
01/01/1998	14/11/1998	116,38	2,60%	318	2,63	365
15/11/1998	31/12/1998	119,36	2,60%	47	0,40	365
01/01/1999	14/11/1999	119,36	2,30%	318	2,39	365
15/11/1999	31/12/1999	122,14	2,30%	47	0,36	365
01/01/2000	14/11/2000	122,14	2,90%	319	3,08	366
15/11/2000	31/12/2000	125,58	2,90%	47	0,46	366
01/01/2001	14/11/2001	125,58	4,40%	318	4,80	365
15/11/2001	31/12/2001	130,84	4,40%	47	0,73	365
01/01/2002	14/11/2002	130,84	3,60%	318	4,09	365
15/11/2002	31/12/2002	135,66	3,60%	47	0,62	365
01/01/2003	14/11/2003	135,66	3,20%	318	3,77	365
15/11/2003	31/12/2003	140,06	3,20%	47	0,57	365
01/01/2004	14/11/2004	140,06	2,40%	319	2,93	366
15/11/2004	31/12/2004	143,55	2,40%	47	0,44	366
01/01/2005	14/11/2005	143,55	2,30%	318	2,87	365
15/11/2005	31/12/2005	146,86	2,30%	47	0,43	365
01/01/2006	14/11/2006	146,86	3,10%	318	3,96	365
15/11/2006	31/12/2006	151,25	3,10%	47	0,60	365
01/01/2007	14/11/2007	151,25	2,50%	318	3,29	365
15/11/2007	31/12/2007	155,14	2,50%	47	0,49	365
01/01/2008	14/11/2008	155,14	2,60%	319	3,51	366
15/11/2008	31/12/2008	159,14	2,60%	47	0,53	366
01/01/2009	14/11/2009	159,14	-0,80%	318	-1,11	365
15/11/2009	31/12/2009	158,56	-0,80%	47	-0,16	365
01/01/2010	14/11/2010	158,56	1,40%	318	1,93	365
15/11/2010	30/11/2010	160,32	1,40%	16	0,10	365
					<b>60,42</b>	

Table 6 – Interest owed based on inflation, until notification, for damage owed since 17/09/1996

From	To	Amount	Interest Rate	Total Days	Interest	Days in Year
17/09/1996	31/12/1996	100,00	3,10%	106	0,89	366
01/01/1997	16/09/1997	100,00	2,30%	259	1,63	365
17/09/1997	31/12/1997	102,51	2,30%	106	0,68	365
01/01/1998	16/09/1998	102,51	2,60%	259	1,88	365
17/09/1998	31/12/1998	105,08	2,60%	106	0,79	365
01/01/1999	16/09/1999	105,08	2,30%	259	1,71	365
17/09/1999	31/12/1999	107,57	2,30%	106	0,71	365
01/01/2000	16/09/2000	107,57	2,90%	260	2,21	366
17/09/2000	31/12/2000	110,49	2,90%	106	0,92	366
01/01/2001	16/09/2001	110,49	4,40%	259	3,43	365
17/09/2001	31/12/2001	114,84	4,40%	106	1,45	365

01/01/2002	16/09/2002	114,84	3,60%	259	2,92	365
17/09/2002	31/12/2002	119,20	3,60%	106	1,23	365
01/01/2003	16/09/2003	119,20	3,20%	259	2,69	365
17/09/2003	31/12/2003	123,13	3,20%	106	1,13	365
01/01/2004	16/09/2004	123,13	2,40%	260	2,09	366
17/09/2004	31/12/2004	126,35	2,40%	106	0,87	366
01/01/2005	16/09/2005	126,35	2,30%	259	2,06	365
17/09/2005	31/12/2005	129,28	2,30%	106	0,86	365
01/01/2006	16/09/2006	129,28	3,10%	259	2,83	365
17/09/2006	31/12/2006	132,97	3,10%	106	1,18	365
01/01/2007	16/09/2007	132,97	2,50%	259	2,35	365
17/09/2007	31/12/2007	136,50	2,50%	106	0,98	365
01/01/2008	16/09/2008	136,50	2,60%	260	2,51	366
17/09/2008	31/12/2008	139,99	2,60%	106	1,04	366
01/01/2009	16/09/2009	139,99	-0,80%	259	-0,80	365
17/09/2009	31/12/2009	140,24	-0,80%	106	-0,33	365
01/01/2010	16/09/2010	140,24	1,40%	259	1,39	365
17/09/2010	30/11/2010	141,31	1,40%	75	0,40	365
					<b>41,71</b>	

Table 7 – Interest owed based on inflation, until notification, for damage owed since 22/02/2006

From	To	Amount	Interest Rate	Total Days	Interest	Days in Year
22/02/2006	31/12/2006	100,00	3,10%	313	2,65	365
01/01/2007	21/02/2007	100,00	2,50%	52	0,35	365
22/02/2007	31/12/2007	103,00	2,50%	313	2,20	365
01/01/2008	21/02/2008	103,00	2,60%	52	0,38	366
22/02/2008	31/12/2008	105,59	2,60%	314	2,35	366
01/01/2009	21/02/2009	105,59	-0,80%	52	-0,12	365
22/02/2009	31/12/2009	107,82	-0,80%	313	-0,74	365
01/01/2010	21/02/2010	107,82	1,40%	52	0,21	365
22/02/2010	30/11/2010	107,29	1,40%	282	1,16	365
					<b>8,45</b>	

Table 8 – Interest owed based on inflation, until notification, for damage owed since 12/08/2008

From	To	Amount	Interest Rate	Total Days	Interest	Days in Year
12/08/2008	31/12/2008	100,00	2,60%	142	1,00	366
01/01/2009	11/08/2009	100,00	-0,80%	223	-0,49	365
12/08/2009	31/12/2009	100,51	-0,80%	142	-0,31	365
01/01/2010	11/08/2010	100,51	1,40%	223	0,86	365
12/08/2010	30/11/2010	101,06	1,40%	110	0,42	365
					<b>1,48</b>	

(PT.52) Until notification, the total amount of interest owed would be **EUR 112,06**.

Table 9 – Interest owed based on legal civil delay interest, from notification to 12/02/2014

From	To	Amount	Interest Rate	Total Days	Civil Interest	Days in Year
30/11/2010	31/12/2010	512,06	4,00%	32	1,76	365
01/01/2011	31/12/2011	512,06	4,00%	365	20,48	365
01/01/2012	31/12/2012	512,06	4,00%	366	20,48	366
01/01/2013	31/12/2013	512,06	4,00%	365	20,48	365
01/01/2014	12/02/2014	512,06	4,00%	42	2,32	365
					<b>65,53</b>	

(PT.53) The total amount owed would thus be **EUR 577,59**. In the alternative scenario of using the legal rate for commercial delay interest, the interest owed since notification would be EUR 126,85, and the total amount owed would be EUR 638,91.

(PT.54) The alternative of using the Central Bank Discount rates for the time prior to the notification of the claim yields the following tables

Table 10 – Interest owed based on Central Bank rate, until notification, for damage owed since 15/11/1993

From	To	Amount	Interest Rate	Total Days	Interest	Days in Year
15.11.1993	30.11.1993	100.00	13.50%	16	0.56	365
01.12.1993	28.02.1994	100.56	13.00%	90	3.08	365
01.03.1994	31.05.1994	103.63	12.00%	92	3.00	365
01.06.1994	31.08.1994	106.64	12.00%	92	3.09	365
01.09.1994	14.11.1994	109.73	12.00%	75	2.59	365
15.11.1994	30.11.1994	112.31	12.00%	16	0.56	365
01.12.1994	28.02.1995	112.87	10.50%	90	2.81	365
01.03.1995	31.05.1995	115.68	10.50%	92	2.95	365
01.06.1995	31.08.1995	118.63	10.50%	92	3.02	365
01.09.1995	14.11.1995	121.66	9.50%	75	2.29	365
15.11.1995	30.11.1995	123.95	9.50%	16	0.49	365
01.12.1995	31.12.1995	124.44	9.50%	31	0.96	365
01.01.1996	30.01.1996	125.40	9.50%	30	0.94	366
31.01.1996	28.02.1996	126.34	9.50%	29	0.91	366
29.02.1996	30.03.1996	127.25	8.75%	31	0.91	366
31.03.1996	29.04.1996	128.16	8.75%	30	0.88	366
30.04.1996	30.05.1996	129.04	8.25%	31	0.87	366
31.05.1996	29.06.1996	129.91	8.25%	30	0.85	366
30.06.1996	30.07.1996	130.76	8.25%	31	0.88	366
31.07.1996	30.08.1996	131.64	8.25%	31	0.89	366
31.08.1996	29.09.1996	132.53	8.25%	30	0.86	366
30.09.1996	30.10.1996	133.39	8.25%	31	0.90	366
31.10.1996	14.11.1996	134.29	8.25%	15	0.44	366
15.11.1996	29.11.1996	134.73	8.25%	15	0.44	366

Portugal

30.11.1996	30.12.1996	135.16	8.25%	31	0.91	366
31.12.1996	31.12.1996	136.07	7.00%	1	0.03	366
01.01.1997	30.01.1997	136.10	7.00%	30	0.76	365
31.01.1997	27.02.1997	136.86	7.00%	28	0.71	365
28.02.1997	30.03.1997	137.57	7.00%	31	0.79	365
31.03.1997	29.04.1997	138.36	7.00%	30	0.77	365
30.04.1997	30.05.1997	139.14	7.00%	31	0.80	365
31.05.1997	29.06.1997	139.94	6.00%	30	0.67	365
30.06.1997	30.07.1997	140.61	6.00%	31	0.70	365
31.07.1997	30.08.1997	141.31	6.00%	31	0.70	365
31.08.1997	29.09.1997	142.01	6.00%	30	0.68	365
30.09.1997	30.10.1997	142.69	6.00%	31	0.71	365
31.10.1997	14.11.1997	143.40	6.00%	15	0.34	365
15.11.1997	29.11.1997	143.74	6.00%	15	0.34	365
30.11.1997	30.12.1997	144.09	6.00%	31	0.71	365
31.12.1997	31.12.1997	144.80	6.00%	1	0.02	365
01.01.1998	30.01.1998	144.82	6.00%	30	0.70	365
31.01.1998	27.02.1998	145.52	6.00%	28	0.65	365
28.02.1998	30.03.1998	146.17	5.00%	31	0.61	365
31.03.1998	29.04.1998	146.78	5.00%	30	0.59	365
30.04.1998	30.05.1998	147.37	5.00%	31	0.61	365
31.05.1998	29.06.1998	147.98	5.00%	30	0.59	365
30.06.1998	30.07.1998	148.57	5.00%	31	0.62	365
31.07.1998	30.08.1998	149.19	5.00%	31	0.62	365
31.08.1998	29.09.1998	149.81	5.00%	30	0.60	365
30.09.1998	30.10.1998	150.41	5.00%	31	0.62	365
31.10.1998	14.11.1998	151.04	5.00%	15	0.30	365
15.11.1998	29.11.1998	151.34	5.00%	15	0.30	365
30.11.1998	30.12.1998	151.64	4.25%	31	0.54	365
31.12.1998	31.12.1998	152.18	3.25%	1	0.01	365
01.01.1999	03.01.1999	152.19	3.00%	3	0.04	365
04.01.1999	21.01.1999	152.23	3.00%	18	0.22	365
22.01.1999	08.04.1999	152.45	3.00%	77	0.95	365
09.04.1999	04.11.1999	153.41	2.50%	210	2.19	365
05.11.1999	14.11.1999	155.60	3.00%	10	0.13	365
15.11.1999	31.12.1999	155.73	3.00%	47	0.59	365
01.01.2000	03.02.2000	156.32	3.00%	34	0.43	366
04.02.2000	16.03.2000	156.75	3.25%	42	0.58	366
17.03.2000	27.04.2000	157.33	3.50%	42	0.62	366
28.04.2000	08.06.2000	157.95	3.75%	42	0.67	366
09.06.2000	27.06.2000	158.62	4.25%	19	0.34	366
28.06.2000	31.08.2000	158.96	4.25%	65	1.18	366
01.09.2000	05.10.2000	160.14	4.50%	35	0.68	366
06.10.2000	14.11.2000	160.82	4.75%	40	0.82	366
15.11.2000	31.12.2000	161.63	4.25%	47	0.87	366
01.01.2001	10.05.2001	162.50	4.25%	130	2.43	365
11.05.2001	30.08.2001	164.93	4.50%	112	2.24	365

Portugal

31.08.2001	17.09.2001	167.17	4.25%	18	0.34	365
18.09.2001	08.11.2001	167.51	3.75%	52	0.88	365
09.11.2001	14.11.2001	168.39	3.25%	6	0.09	365
15.11.2001	31.12.2001	168.48	3.25%	47	0.70	365
01.01.2002	14.11.2002	169.18	3.25%	318	4.78	365
15.11.2002	05.12.2002	173.96	3.25%	21	0.32	365
06.12.2002	31.12.2002	174.28	2.75%	26	0.34	365
01.01.2003	06.03.2003	174.62	2.75%	65	0.85	365
07.03.2003	05.06.2003	175.46	2.50%	91	1.08	365
06.06.2003	14.11.2003	176.55	2.00%	162	1.56	365
15.11.2003	31.12.2003	178.10	2.00%	47	0.45	365
01.01.2004	14.11.2004	178.56	2.00%	319	3.11	366
15.11.2004	31.12.2004	181.67	2.00%	47	0.46	366
01.01.2005	14.11.2005	182.13	2.00%	318	3.17	365
15.11.2005	05.12.2005	185.30	2.00%	21	0.21	365
06.12.2005	31.12.2005	185.51	2.25%	26	0.29	365
01.01.2006	07.03.2006	185.81	2.25%	66	0.75	365
08.03.2006	14.06.2006	186.55	2.50%	99	1.25	365
15.06.2006	08.08.2006	187.81	2.75%	55	0.77	365
09.08.2006	10.10.2006	188.58	3.00%	63	0.96	365
11.10.2006	14.11.2006	189.54	3.25%	35	0.58	365
15.11.2006	12.12.2006	190.12	3.25%	28	0.47	365
13.12.2006	31.12.2006	190.59	3.50%	19	0.34	365
01.01.2007	13.03.2007	190.93	3.50%	72	1.30	365
14.03.2007	12.06.2007	192.23	3.75%	91	1.77	365
13.06.2007	14.11.2007	194.01	4.00%	155	3.26	365
15.11.2007	31.12.2007	197.26	4.00%	47	1.00	365
01.01.2008	08.07.2008	198.26	4.00%	190	4.08	366
09.07.2008	14.10.2008	202.34	4.25%	98	2.27	366
15.10.2008	11.11.2008	204.61	3.75%	28	0.58	366
12.11.2008	14.11.2008	205.19	3.25%	3	0.05	366
15.11.2008	09.12.2008	205.24	3.25%	25	0.45	366
10.12.2008	31.12.2008	205.69	2.50%	22	0.31	366
01.01.2009	20.01.2009	205.99	2.50%	20	0.28	365
21.01.2009	10.03.2009	206.27	2.00%	49	0.55	365
11.03.2009	07.04.2009	206.82	1.50%	28	0.24	365
08.04.2009	12.05.2009	207.06	1.25%	35	0.25	365
13.05.2009	14.11.2009	207.30	1.00%	186	1.05	365
15.11.2009	31.12.2009	208.36	1.00%	47	0.27	365
01.01.2010	14.11.2010	208.63	1.00%	318	1.82	365
15.11.2010	30.11.2010	210.44	1.00%	16	0.09	365

110.53



Table 11 – Interest owed based on Central Bank rate, until notification, for damage owed since 17/09/1996

From	To	Amount	Interest Rate	Total Days	Interest	Days in Year
17.09.1996	29.09.1996	100.00	8.25%	13	0.28	366
30.09.1996	30.10.1996	100.28	8.25%	31	0.68	366
31.10.1996	29.11.1996	100.96	7.00%	30	0.56	365
30.11.1996	30.12.1996	101.52	7.00%	31	0.59	365
31.12.1996	30.01.1997	102.11	7.00%	31	0.59	365
31.01.1997	27.02.1997	102.69	7.00%	28	0.53	365
28.02.1997	30.03.1997	103.23	7.00%	31	0.59	365
31.03.1997	29.04.1997	103.82	6.00%	30	0.50	365
30.04.1997	30.05.1997	104.32	6.00%	31	0.52	365
31.05.1997	29.06.1997	104.84	6.00%	30	0.50	365
30.06.1997	16.09.1997	105.34	6.00%	79	1.34	365
17.09.1997	29.09.1997	106.68	6.00%	13	0.22	365
30.09.1997	30.10.1997	106.90	6.00%	31	0.53	365
31.10.1997	29.11.1997	107.43	6.00%	30	0.52	365
30.11.1997	30.12.1997	107.95	6.00%	31	0.54	365
31.12.1997	30.01.1998	108.48	6.00%	31	0.54	365
31.01.1998	27.02.1998	109.02	6.00%	28	0.49	365
28.02.1998	30.03.1998	109.51	5.00%	31	0.45	365
31.03.1998	29.04.1998	109.96	5.00%	30	0.44	365
30.04.1998	30.05.1998	110.41	5.00%	31	0.46	365
31.05.1998	29.06.1998	110.86	5.00%	30	0.45	365
30.06.1998	30.07.1998	111.31	5.00%	31	0.46	365
31.07.1998	30.08.1998	111.77	5.00%	31	0.46	365
31.08.1998	16.09.1998	112.24	5.00%	17	0.26	365
17.09.1998	29.09.1998	112.49	5.00%	13	0.20	365
30.09.1998	30.10.1998	112.69	5.00%	31	0.47	365
31.10.1998	29.11.1998	113.16	5.00%	30	0.45	365
30.11.1998	30.12.1998	113.61	4.25%	31	0.40	365
31.12.1998	31.12.1998	114.01	3.25%	1	0.01	365
01.01.1999	03.01.1999	114.02	3.00%	3	0.03	365
04.01.1999	21.01.1999	114.05	3.00%	18	0.17	365
22.01.1999	08.04.1999	114.22	3.00%	77	0.71	365
09.04.1999	16.09.1999	114.93	2.50%	161	1.26	365
17.09.1999	04.11.1999	116.19	2.50%	49	0.39	365
05.11.1999	03.02.2000	116.58	3.00%	91	0.86	365
04.02.2000	16.03.2000	117.44	3.25%	42	0.43	366
17.03.2000	27.04.2000	117.87	3.50%	42	0.47	366
28.04.2000	08.06.2000	118.34	3.75%	42	0.50	366
09.06.2000	27.06.2000	118.84	4.25%	19	0.26	366
28.06.2000	31.08.2000	119.09	4.25%	65	0.88	366
01.09.2000	16.09.2000	119.98	4.50%	16	0.23	366
17.09.2000	05.10.2000	120.21	4.50%	19	0.27	366
06.10.2000	31.12.2000	120.48	4.75%	87	1.34	366

Portugal

01.01.2001	10.05.2001	121.82	4.75%	130	2.03	365
11.05.2001	30.08.2001	123.85	4.50%	112	1.68	365
31.08.2001	16.09.2001	125.53	4.25%	17	0.24	365
17.09.2001	17.09.2001	125.78	4.25%	1	0.01	365
18.09.2001	08.11.2001	125.79	3.75%	52	0.66	365
09.11.2001	16.09.2002	126.45	3.25%	312	3.50	365
17.09.2002	05.12.2002	129.96	3.25%	80	0.91	365
06.12.2002	31.12.2002	130.87	2.75%	26	0.25	365
01.01.2003	06.03.2003	131.13	2.75%	65	0.64	365
07.03.2003	05.06.2003	131.76	2.50%	91	0.81	365
06.06.2003	16.09.2003	132.57	2.00%	103	0.74	365
17.09.2003	31.12.2003	133.32	2.00%	106	0.77	365
01.01.2004	16.09.2004	134.09	2.00%	260	1.90	366
17.09.2004	31.12.2004	135.99	2.00%	106	0.78	366
01.01.2005	16.09.2005	136.77	2.00%	259	1.94	365
17.09.2005	05.12.2005	138.70	2.00%	80	0.60	365
06.12.2005	31.12.2005	139.31	2.25%	26	0.22	365
01.01.2006	07.03.2006	139.53	2.25%	66	0.56	365
08.03.2006	14.06.2006	140.09	2.50%	99	0.94	365
15.06.2006	08.08.2006	141.03	2.75%	55	0.58	365
09.08.2006	16.09.2006	141.61	3.00%	39	0.45	365
17.09.2006	10.10.2006	142.06	3.00%	24	0.28	365
11.10.2006	12.12.2006	142.33	3.25%	63	0.79	365
13.12.2006	31.12.2006	143.12	3.50%	19	0.26	365
01.01.2007	13.03.2007	143.38	3.50%	72	0.98	365
14.03.2007	12.06.2007	144.35	3.75%	91	1.33	365
13.06.2007	16.09.2007	145.68	4.00%	96	1.51	365
17.09.2007	31.12.2007	147.20	4.00%	106	1.69	365
01.01.2008	08.07.2008	148.88	4.00%	190	3.06	366
09.07.2008	16.09.2008	151.94	4.25%	70	1.21	366
17.09.2008	14.10.2008	153.16	4.25%	28	0.49	366
15.10.2008	11.11.2008	153.65	3.75%	28	0.43	366
12.11.2008	09.12.2008	154.08	3.25%	28	0.38	366
10.12.2008	31.12.2008	154.46	2.50%	22	0.23	366
01.01.2009	20.01.2009	154.69	2.50%	20	0.21	365
21.01.2009	10.03.2009	154.90	2.00%	49	0.41	365
11.03.2009	07.04.2009	155.31	1.50%	28	0.18	365
08.04.2009	12.05.2009	155.49	1.25%	35	0.19	365
13.05.2009	16.09.2009	155.67	1.00%	127	0.54	365
17.09.2009	31.12.2009	156.21	1.00%	106	0.45	365
01.01.2010	16.09.2010	156.66	1.00%	259	1.11	365
17.09.2010	30.11.2010	157.77	1.00%	75	0.32	365

58.10

Table 12 – Interest owed based on Central Bank rate, until notification, for damage owed since 22/02/2006

From	To	Amount	Interest Rate	Total Days	Interest	Days in Year
22.02.2006	07.03.2006	100.00	2.25%	14	0.09	365
08.03.2006	14.06.2006	100.09	2.50%	99	0.67	365
15.06.2006	08.08.2006	100.76	2.75%	55	0.41	365
09.08.2006	10.10.2006	101.17	3.00%	63	0.52	365
11.10.2006	12.12.2006	101.69	3.25%	63	0.56	365
13.12.2006	31.12.2006	102.25	3.50%	19	0.18	365
01.01.2007	21.02.2007	102.43	3.50%	52	0.50	365
22.02.2007	13.03.2007	102.94	3.50%	20	0.19	365
14.03.2007	12.06.2007	103.13	3.75%	91	0.95	365
13.06.2007	31.12.2007	104.08	4.00%	202	2.28	365
01.01.2008	21.02.2008	106.37	4.00%	52	0.59	366
22.02.2008	08.07.2008	106.96	4.00%	138	1.59	366
09.07.2008	14.10.2008	108.55	4.25%	98	1.22	366
15.10.2008	11.11.2008	109.77	3.75%	28	0.31	366
12.11.2008	09.12.2008	110.08	3.25%	28	0.27	366
10.12.2008	20.01.2009	110.35	2.50%	42	0.31	366
21.01.2009	21.02.2009	110.66	2.00%	32	0.19	365
22.02.2009	10.03.2009	110.86	2.00%	17	0.10	365
11.03.2009	07.04.2009	110.96	1.50%	28	0.13	365
08.04.2009	12.05.2009	111.08	1.25%	35	0.13	365
13.05.2009	21.02.2010	111.22	1.00%	285	0.87	365
22.02.2010	30.11.2010	112.08	1.00%	282	0.86	365
					<b>12.95</b>	

Table 13 – Interest owed based on Central Bank rate, until notification, for damage owed since 12/08/2008

From	To	Amount	Interest Rate	Total Days	Interest	Days in Year
12.08.2008	14.10.2008	100.00	4.25%	64	0.73	366
15.10.2008	11.11.2008	100.73	3.75%	28	0.28	366
12.11.2008	09.12.2008	101.01	3.25%	28	0.25	366
10.12.2008	31.12.2008	101.26	3.25%	22	0.19	366
01.01.2009	20.01.2009	101.46	3.25%	20	0.18	365
21.01.2009	10.03.2009	101.63	2.00%	49	0.27	365
11.03.2009	07.04.2009	101.91	1.50%	28	0.12	365
08.04.2009	12.05.2009	102.02	1.25%	35	0.12	365
13.05.2009	11.08.2009	102.14	1.00%	91	0.25	365
12.08.2010	30.11.2010	102.40	1.00%	110	0.31	365
					<b>2.70</b>	

(PT.55) The total interest earned based on the Central Bank rate, until notification, is therefore 184.28.

Table 14 – Interest owed based on legal civil delay interest, from notification to 12/02/2014

From	To	Amount	Interest Rate	Total Days	Interest	Days in Year
30.11.2010	31.12.2010	584.28	4.00%	32	2.01	365
01.01.2011	31.12.2011	584.28	4.00%	365	23.37	365
01.01.2012	31.12.2012	584.28	4.00%	366	23.37	366
01.01.2013	31.12.2013	584.28	4.00%	365	23.37	365
01.01.2014	12.02.2014	584.28	4.00%	42	2.64	365
					<b>74.77</b>	

(PT.56) In this scenario, the total amount owed would thus be **EUR 659.05**. If the legal rate for commercial delay interest were used, the interest owed since notification would be EUR **144.74**, and the total amount owed would be EUR **729.03**.

(PT.57) In the alternative scenario of using ROI + civil delay interest, the total amount owed would be EUR 509,57. And if ROI + commercial delay interest were used, the total amount owed would be EUR 563,67.

### Section III. Procedural Aspects

**3.1. What are the procedures for the party seeking to receive interest on the damages paid? (e.g. does the claimant have to make a separate plea for the interest payments and if so, what information and evidence must be supplied? Does the judge award interest *ex officio* or does the claimant have to request it?).**

(PT.58) The claimant seeking to receive interest on damages must include that in the final request of the respective submissions. In the case of legal delay interest, no further information or evidence need be required, other than the facts which allow the conclusion that the interest is owed after a certain date (when applicable). If compensatory interest – relating to remuneration of capital – is sought, the party must allege the facts and provide the necessary evidence to substantiate the method it is suggesting to use to calculate the amount of the interest.

**3.2. Can the judge award a higher interest amount than requested by the claimant or does the principle of *ne ultra petita* apply?**

(PT.59) The principle of *ne ultra petita* applies (articles 609 and 615(1)(e) of the Code of Civil Procedure).

**3.3. Can the judge estimate interest or does interest always have to be calculated?**

(PT.60) The judge can only award interest if it does not exceed what has been requested by the party. But it need not be specifically calculated by the party.

**3.4. If the claimant changes the request regarding the interest, is this regarded as an amendment of the pleadings? Is this only possible until a certain stage into the proceedings and precluded later on or can the claimant make such changes without negative procedural consequences at any time up to the judgment?**

- (PT.61) Under article 265(2) of the Code of Civil Procedure, the applicant may unilaterally, at any moment, until the closing of the discussion in the 1<sup>st</sup> instance, reduce its request to the court (“pedido”). He may also increase it, if this extension is a development or a consequence of the original request.
- (PT.62) Within this legal framework, the claimant may amend the request to include interest or updating to take into account inflation, to the extent that this does not involve the allegation of new facts. This may be done by simple written request presented to the court until the closure of the discussion in the 1<sup>st</sup> instance. Differently, if making such an additional claim implies alleging new facts, this can only occur when those facts were known to the claimant after filing the application.<sup>[1]</sup>

#### **Section IV. Specific Instances**

##### **4.1. Identify any cases relating to damages claims for infringements of competition law and explain how interest was calculated. In writing these summaries, provide all relevant information about how interest and other compensation for the effluxion of time was calculated.**

- (PT.63) As described in Preliminary Matters, in Portugal there are no precedents of calculation of interest on damages arising from infringements of competition law. This is so because very few cases have so far led to any kind of monetary award whatsoever – only three –, and in none of these was interest calculated, for varying reasons.

###### **1. *Carrefour v. Orex Dois***

**Facts:** Carrefour sued a supplier for breach of contract, namely failure to pay certain services provided to it by Carrefour. The supplier defended itself arguing that certain of the contractual clauses in question, and the charges they imposed, infringed competition law. In that part of the case, the court concluded the defendant was correct and ordered Carrefour to return sums previously paid by Orex Dois, under those clauses deemed null and void (restitution).

**Amount sought:** EUR 50.000 (defendant’s request for compensation)

**Court:** Lisbon Court of Appeal (6882/2005-8)

**Date:** 24/11/2005

**Decision:** EUR 49.000 awarded

**Brief comment:** There is no mention of interest in what concerns the defendant’s request for compensation. Interest over the amount owed is not discussed at all in the Appeal Court judgment, and the facts of the case seem to suggest that the amount corresponds exactly to the payments unlawfully required by the applicant and carried out by the defendant, with no updating of the value for inflation or accrueement of interest.

###### **2. *Dealer v. Toyota***

**Facts:** Toyota ended a long-standing relationship with one of its dealers, after creating another dealer in the same territory, which it jointly controlled with another undertaking. The dealer sued for damages, claiming, *inter alia*, an abuse of economic dependence, under national competition law. The courts concluded that the requisites for relative dominant position and that the termination of the contractual

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<sup>[1]</sup> See, e.g., Lisbon Appeal Court Judgment of 26/06/2008 (case no. 0831515).

relationship in the context it occurred was abusive. In the last instance, the Supreme Court awarded compensation for abuse of economic dependence, not because of the direct damages this caused or loss of profit (which was analyzed separately), but because of “indirect damages”, specifically the “fraudulent frustration of the expectations of the applicant”.

**Amount sought:** Difficult to determine corresponding amount, because application did not include an autonomous amount for abuse of economic dependence, as in the court’s decision. A total of EUR 1.6 million was sought.

**Court:** Supreme Court (178/07.2TVPR.T.P1.S1)

**Date:** 20/06/2013

**Decision:** EUR 50.000 awarded, plus delay interest starting from notification of suit

**Brief comment:** Interest is not discussed at all, in what concerns the infringement of competition law. The atypical manner in which the compensation was calculated may, in this case, account for that omission. The Supreme Court slightly increased the amount set in the lower courts (initially set at EUR 21.900) and specified that it was not particularly concerned with assessing the correspondence of that amount to actual damages. The applicant asked for delay interest, starting from the time of the notification until complete payment, which was granted, globally, over all the amounts of compensation granted.

### 3. *ANF v IMS Health*

**Facts:** This was a dispute between the National Association of Pharmacies and IMS Health, submitted to an arbitral tribunal and subsequently appealed to the Lisbon Court of Appeal, relating to the market for pharma market intelligence. ANF supplied IMS with data from its members, which IMS used to compile and process, so as to sell market intelligence reports. After a time, the ANF creates a company to compete in this market with IMF. The prices it charged IMF for the data increased substantially. Before the arbitral tribunal, ANF sought payment of unpaid invoices, amounting to EUR 18,2 million, plus loss of profits and delay interest. IMS sought compensation of EUR 19 million, for loss of business and non-patrimonial damages, based, *inter alia*, on an infringement of competition law. Because it considered this part of the request based on tort, the Lisbon Appeal Court excluded it from the scope of the arbitration. But it found that the contractual clause setting the price was null and void, in the part which was deemed excessive pricing, due to an abuse of dominant position, and ordered that the excess part of the pricing be returned to IMS.

**Amount sought:** EUR 19 million (interest was not requested)

**Court:** Lisbon Appeal Court (672/11.0YRLSB)

**Date:** 03/04/2014

**Decision:** EUR 887.000 awarded.

**Brief comment:** Interest is not discussed at all, in what concerns the infringement of competition law. Should be noted, however, that the arbitral tribunal, when determining the “fair” price it used to calculate the excessive margin of the abusive pricing, it took into account the rate of inflation during the relevant period.

**4.2. Are the rules on the award of interest specific to the kinds of claim or general principles? Are there any specific approaches/rules that you can identify in national or EU competition cases, or in other cases where the claim is brought by business against business (B2B) and are there any specific approaches/rules in business versus consumer (B2C) cases?**

(PT.64) The rules on the award of interest are general rules, there are no rules specific to competition law. No specific approaches or differentiated analysis can be identified in the existing precedents. Other than the possibility of discussing the applicability of the interest rate determined in the Commercial Code, there is no difference in the legal framework applicable to B2B and B2C cases.

***Section V. Evaluation, Interpretation in conformity with EU Law, and Intertemporal Aspect***

**5.1. Throughout the reports, evaluate how satisfactory are the rules on the calculation of interest perceived to be? In considering this question, identify any law reform proposals in the last 15 years or so, or any major judgments by the higher courts that call into question or change some of the issues pertaining to the award of damages. Please identify changes of relevant national law on interest that will come into force or are currently considered.**

(PT.65) While this assessment is necessarily subjective, I believe it is fair to state that, while Portuguese courts fully recognise the right to a complete compensation, in theory, they have a somewhat restrictive approach, in practice, to the way they assess damages. While the main categories of damages are recognised and granted by the courts, including loss of profit, courts have very little experience with, and, probably, reduced openness to consider the granting of compensatory interest other than the legally determined delay interest (which, generally, can only be sought, in these cases, from the moment of notification of the suit).

(PT.66) Courts will generally be willing to update the amount of damages, prior to notification, to adjust for inflation. And they may also recognize that, if a company proves that the unavailability of the capital during the relevant period caused damages to it (e.g., opportunity cost), those damages should also be compensated. But the method of quantifying these damages is very much an open issue.

**5.2. For each question, where it is relevant, assess the compliance of the national interest rules with the minimum standard prescribed by EU law ('full compensation'). If national law does not grant full compensation, please try to identify an interpretation of national law that guarantees full compensation in conformity with European law.**

(PT.67) The Portuguese legal framework gives courts the instruments they need to ensure full compensation, in accordance with EU law. The difficulties in achieving this full compensation in practice seem to have more to do with the options made by litigators, than necessarily by the interpretation of the law by the courts.

(PT.68) That being said, it cannot be excluded that some courts – including the Supreme Court – might interpret the law in such a way that, in practice, would not allow access to full compensation, as required by the case-law of the ECJ, specifically in what concerns compensatory interest corresponding to the remuneration of the unavailable capital before the notification of the suit.

**5.3. Finally, when assessing the overall compliance of national law with the principle of full compensation based on directly applicable EU law, please confirm that national courts have to apply it also in relation to past infringements of EU competition law or the equivalent provisions of the EEA agreement (e.g. cartels starting in the 1990ies and ending in the 2000er years).**

(PT.69) As far as the letter of the law goes, national competition law should be applied by the courts in parallel with EU competition law, whenever the practices affect trade between Member States. There are some examples of this in private enforcement cases.

(PT.70) However, it should be noted that Portuguese courts have frequently refused to apply EU competition law in cases where, according to the case-law of the ECJ, there was clearly an effect on trade between Member States. The dominant (but not exclusive) opinion of national courts continues to be that if a practice directly affects relations only between Portuguese companies, then only Portuguese competition law should be applied. This may, in the future, be a substantive obstacle to the challenging, before the ECJ, of domestic interpretation of how to grant full compensation, as courts have tended to rule out the possibility of referrals with the argument that EU Competition Law is not applicable.

**5.4. Regarding the secondary subject of investigation (interest on damages due to infringements of national competition law only) Recital 12 of the preamble of Directive 2014/104/EU summarises the EU law principles regarding interest as follows:**

*“Anyone who has suffered harm caused by an infringement can claim compensation for the actual loss (damnum emergens), for the gain of which he has been deprived (loss of profit or lucrum cessans) plus interest. This is irrespective of whether the national rules define these categories separately or in combination. The payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time, and it should be due from the time the harm occurred until compensation is paid, without prejudice to the qualification of such interest as compensatory or default interest under national law. This is also without prejudice to whether effluxion of time is taken into account as a separate category (interest) or as a constituent part of actual loss of profit. It is incumbent on the Member States to lay down the rules to be applied for that purpose”.*

**Would the right to full compensation as set out by Recital 12 of the proposed directive apply to interest calculation for damages in cases where only national competition law has been infringed and the damage occurred before the implementation of the directive came into force?**

(SK.1) National principles and rules relating to the right to full compensation are harmonious with Recital 12, as far as the letter of the law is concerned. Thus, they would apply in cases where only national competition law has been infringed.





## Slovakia

Ján Husár and Kristián Csach \*

### *Preliminary Matters*

In Slovakia, there is no history of competition claims for damages. Slovak legal order does not contain any explicit provision allowing to bring a claim against those acting contrary to competition rules. Even the recent amendment in Competition Act<sup>620</sup> which reflected previous decision of European Court of Justice in this field of law<sup>621</sup> did not change this approach. The right for compensation of damages suffered due to competition law infringements is derived from the obligation to behave fairly in competition and refrain from restraining (§ 41 Slovak Commercial Code<sup>622</sup> – SCommC) combined with a general rule on liability according to § 373 SCommC<sup>623</sup> + § 757 SCommC.<sup>624</sup> The liability for a breach of a duty imposed by the SCommC is governed by the Commercial Code<sup>625</sup> and Civil Code rules apply only complementary.

There is no Slovak case law on the matter (calculation of interest within actions for damages for breach of competition law), therefore the presented calculation of damages and interest is rather theoretical, derived from the general concepts and interpretations.

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<sup>620</sup> Competition Act No. 136/2001 Coll.

<sup>621</sup> Judgment *Kone and Others*, C-557/12, EU:C:2014:1317, mostly paragraphs 33-37.

<sup>622</sup> § 41 SCommC (emphasis added): “Individuals and legal entities taking part in economic competition (hereafter referred to as “competitors”), even though they are not entrepreneurs, have the right freely to develop their competitive activity in order to achieve economic benefits and to associate for the pursuit of such activity. **However, they shall observe the legally binding provisions on economic competition and may not abuse their participation in such economic competition.**” “Fyzické i právnické osoby, ktoré sa zúčastňujú na hospodárskej súťaži, aj keď nie sú podnikateľmi (ďalej len súťažitelia), majú právo slobodne rozvíjať svoju súťažnú činnosť v záujme dosiahnutia hospodárskeho prospechu a združovať sa a výkon tejto činnosti; sú však povinné pritom dbať na právne záväzné pravidlá hospodárskej súťaže a nesmú účasť na súťaži zneužívať.”

<sup>623</sup> § 373 SCommC: “Whoever breaches a duty (iný preklad hovorí o obligation, neviem, ktorý je správny) arising from a contractual relationship (a toto sa mi nezdá ako správny preklad no...) is obliged to provide compensation for the damage (i.e. damages) caused to the other party, unless he proves that such a breach was caused by circumstances excluding his liability.” “Kto poruší svoju povinnosť zo záväzkového vzťahu, je povinný nahradiť škodu tým spôsobenú druhej strane, ibaže preukáže, že porušenie povinností bolo spôsobené okolnosťami vylučujúcimi zodpovednosť.”

<sup>624</sup> § 757 SCommC: „The provisions of section 373 et seq apply, as appropriate, to liability for damage caused by a breach of the obligations stipulated by this Code.“ „Pre zodpovednosť za škodu spôsobenú porušením povinností ustanovených týmto zákonom platia obdobne ustanovenia § 373 a nasl.“

<sup>625</sup> Slovak private law is regulated by two different codes – Civil Code and Commercial Code, so problems connected with dualistic approach to private law may also arise in the basis for competition claims for damages. Legal doctrine is united in the opinion that damages and question of interest is part of commercial law and related provisions in Commercial Code apply. See Králik, A. *Náhrada škody spôsobenej porušením súťažného práva*. Bratislava, C.H. Beck, 2014, pp. 107 et seq., Králičková, B. *Súkromnoprávne aspekty protimonopolného práva*. Bratislava, VEDA, 2012, p. 153.

## Section I. General Principles

### 1.1. What is interest? Is there a definition?

- (SK.1) There is no definition of interest in the Slovak legal order. It can be characterized as a payment which depends on the amount of debt, on the period of debtor's delay and on the certain coefficient (usually determined in percent or per mile).
- (SK.2) The interest could be divided into statutory interest and contractual interest. Whereas the statutory interest is imposed by statute, the contractual interest is agreed by parties as a result of their contractual freedom (interest agreed in contracts on e.g. checking account, credits, mortgage, loans etc.). If no contractual arrangements have been made, the statutory interest rate applies for both the regular interest rate (interest rate on loans, etc.) and late payment interest rate.
- (SK.3) The late payment interest (or a default interest) is a sanction imposed on a debtor who is in delay with payment of his pecuniary obligation. If there is non-pecuniary obligation (*facere, pati*) it is not possible to request a statutory interest, on the other hand there is still the possibility to agree on interest for non-pecuniary obligation in a contract.<sup>626</sup> The obligation to pay late payment interest rate is a general consequence of delay with the performance of any pecuniary obligation (whether contractual or non-contractual – tort/delict, unjust enrichment).

### 1.2. When, and under what conditions, is interest payable at all? Does this depend on whether the claim is brought in tort, breach of contract or (where applicable) restitution/unjust enrichment?

- (SK.4) It is particularly upon parties' contractual agreement to set the rate of interest in their contract (both standard interest and late payment interest). If there are no contractual arrangements, the late payment interest rate according to the government decree applies.<sup>627</sup> For tort claims, the statutory rate applies. Generally, the late payment interest is payable as soon as the claim is mature and the debtor is in delay (in both contractual and tortious relations).
- (SK.5) Slovak regulation on late payment interest in the Commercial Code has been amended in order to comply with the directive on late payments.<sup>628</sup> For the implementation of the late payment directive, the Slovak legislator amended the Slovak regulation on late payment interest which is regarded as a general consequence of a delay in the performance of any monetary obligation (§ 369 SCommC)<sup>629</sup>. An expressed general rule under which no special request by the creditor is necessary as the claim for late payment interest arises *ex lege* due to the debtor's delay was thereby introduced.<sup>630</sup> The right to request late payment interest arises with the delay in performance by the debtor.

<sup>626</sup> Ovečková, O. In Ovečková, O. et al. *Obchodný zákonník. Komentár*. Third Edition. Bratislava, Iura Edition, 2012, p. 272.

<sup>627</sup> Government decree No. 21/2013 Coll.

<sup>628</sup> Directive 2011/7/EU of The European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions.

<sup>629</sup> § 369 (1) SCommC: "If the debtor is in delay with fulfilment of his pecuniary obligation or its part, the creditor who fulfilled his legal or contractual obligations is entitled to interest for late payment in the rate agreed in contract, without any necessity of a reminder or notice."

<sup>630</sup> Ďurica, M. In Patakyová, M. et al. *Obchodný zákonník. Komentár*. Fourth Edition. Bratislava, C.H.Beck, 2013, p. 1225.

- (SK.6) However, as the regulation on late payment interest in § 369 et subsequent SCommC covers both contractual and non-contractual obligations (incl. unjust enrichment if the SCommC is applicable) the difference of rules regulating and facts influencing the maturity of contractual and non-contractual relations must be taken into account. The claim for late payment interest arises with the delay of the performance of the pecuniary obligation for damages which itself is dependent on the actual date the maturity of the breached obligation. The maturity of the obligation might be agreed on by the parties (contractual claims) or if no agreement on maturity has been reached (contractual and non-contractual claims), the creditor may ask the debtor to perform his obligation on the day following his request (notice to the debtor - § 563 Slovak Civil Code).<sup>631</sup> Therefore, although no notice with regard to the late payment interest is required, but a notice to set up maturity of the pecuniary obligation (claim for damages) itself is required. For more, see below in section 2.

### **1.5. Is payment of interest compulsory or at the discretion of the court?**

- (SK.7) The payment of late payment interest is compulsory if demanded by the plaintiff, the court does not have any room for discretion.<sup>632</sup>

### **1.6. What is said to be the purpose of the interest payment?**

- (SK.8) Late payment interest serves, according to both doctrine and case law, three basic functions – prevention, compensation and vindicatory.
- (SK.9) The first one is preventive as it deters debtors *ex ante* (before a breach of obligation).<sup>633</sup>
- (SK.10) At the same time it serves a compensatory function. The late payment interest shall compensate the creditor who cannot dispose of the money during the debtors' delay.<sup>634</sup>
- (SK.11) The vindicatory function means that the late payment interest is a sanction imposed on the debtor in delay with payment of his pecuniary obligation. This function is more relevant in case the creditor did not suffer any actual damage due to the debtor's delay.

### **1.7. What is the legal basis for the payment of interest (statutes, contractual agreements, case-law, soft law guidance)?**

- (SK.12) The legal basis for the payment of interest is the Civil Code for civil claims and the Commercial Code for commercial claims, both supplemented by a governmental regulation defining the rate of interest for late payment. A claim for damages is regarded as a commercial claim if the obligation breached was imposed by the Commercial Code (see preliminary remarks).

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<sup>631</sup> § 563 Slovak Civil Code: „Unless the due date is agreed, laid down by a legal regulation or specified in a court's decision, the debtor must perform the debt on the first day after he was asked for the performance by the creditor.“ „Ak čas splnenia nie je dohodnutý, ustanovený právnym predpisom alebo určený v rozhodnutí, je dlžník povinný splniť dlh prvého dňa po tom, čo ho o plnenie veriteľ požiadal.“

<sup>632</sup> Court has room for discretion in cases where some kind of sanction is in a contract but it is not obvious if this sanction means that parties concluded to pay interest or if it is contractual penalty.

<sup>633</sup> Ovečková, O. *Zmluvná pokuta*. Second Edition. Bratislava, Iura Edition, 2011, p. 242.

<sup>634</sup> Ovečková, O. In Ovečková, O. et al. *Obchodný zákonník. Komentár*. Bratislava, Iura Edition, 2013, p. 272 et seq.

## Section II. Calculation of Interest

### 2.1. What is the rate of interest that is set? How is it arrived at? Are there statutes?

- (SK.13) § 369 subs. 2<sup>635</sup> of SCommC deals with the calculations for setting the statutory rate of the late payment interest. The current version of the second paragraph of the article establishes that the statutory interest rate is set by government decree.<sup>636</sup> Calculation of the interest rate is based on the rate set by the European Central Bank for main refinancing operations. Besides the late payment interest rate also the statutory (amendable by contractual agreement) regular interest rate (for contracts on loan) is defined as the average interest rate for loans offered by banks in the debtor's place of business at the time the contract was concluded (§ 502 SCommC).<sup>637</sup>
- (SK.14) The SCommC regulation on late payment interest rate calculation has been amended repeatedly. Between 1<sup>st</sup> January 1993 and 31<sup>st</sup> January 2004, the statutory interest rate was set by § 369 subs. 1 SCommC as the usual interest rate applicable for loans provided by banks at the debtor's seat at the time of conclusion of the contract increased by 1 %.
- (SK.15) Since 2<sup>nd</sup> February 2004 until 31<sup>st</sup> December 2008, the statutory late payment interest rate was calculated on the base reference rate applied by the Slovak Central Bank before the first calendar day of the semester in which delay has started, increased by ten percentage points.<sup>638</sup> Between 1<sup>st</sup> January 2009 and 14<sup>th</sup> January 2009 SCommC referred to a reference rate applied by the ECB, however the mechanism for calculation of the late payment interest was not changed.
- (SK.16) Since 15<sup>th</sup> January 2009 until 31<sup>st</sup> January 2013, the statutory late payment interest rate was calculated according to rules set by the Slovak Civil Code (§ 369 SCommC referred to the civil law rules on the calculation). In particular, they were contained in a government decree Nr. 87/1995 Coll. as the basic reference rate applied by the ECB on the first day of delay increased by 8 percentage points. According to § 3 (2) of the decree, shall the ECB reference rate change within a semester and it is more profitable for the creditor, the late payment

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<sup>635</sup> Art. 369 par. 2 of the Slovak Commercial Code is entitled "Interest rate" and reads as follows: "If the late payment interest has not been agreed on in a contract, a debtor has to pay interest with an interest rate set by the Slovak government decree." The original wording: "Ak výška z úrokov z omeškania nebola dohodnutá, dlžník je povinný platiť úroky z omeškania v sadzbe, ktorú ustanoví vláda Slovenskej republiky nariadením."

<sup>636</sup> Slovak Government Decree No. 21/2013 of 23<sup>rd</sup> January 2013.

<sup>637</sup> Art. 502 of the Slovak Commercial Code reads as follows: "(1) As of the day when the debtor is provided with the monetary resources, he shall pay interest on them at the agreed rate, otherwise at the maximum rate set by law or on the basis of law. If an interest rate is not fixed in this manner, the debtor shall pay the usual rate of interest as demanded on credits by banks at the place of the debtor's registered office at the time of the conclusion of the contract. If parties agree on a higher interest rate than the rate permitted by law or on the basis of law, the debtor is bound to pay the interest at the maximum permissible rate.

(2) In case of doubt, it is presumed that the agreed interest rate is interest per annum." The original wording: "(1) Od doby poskytnutia peňažných prostriedkov je dlžník povinný platiť z nich úroky v dojednanej výške, inak v najvyššej prípustnej výške ustanovenej zákonom alebo na základe zákona. Ak úroky nie sú takto určené, je dlžník povinný platiť obvyklé úroky požadované za úvery, ktoré poskytujú banky v mieste sídla dlžníka v čase uzavretia zmluvy. Ak strany dojednávajú úroky vyššie než prípustné podľa zákona alebo na základe zákona, je dlžník povinný platiť úroky v najvyššie prípustnej výške.

(2) Pri pochybnostiach sa predpokladá, že dojednaná výška úrokov sa týka ročného obdobia."

<sup>638</sup> Available at <http://www.nbs.sk/en/statistics/data-categories-of-sdds/interest-rates/interest-rates-of-the-nbs/basic-interest-rate-of-the-nbs>.

interest rate changes automatically according to the model: ECB reference rate plus 7 percentage points and this interest rate is used for the entire semester.

- (SK.17) Since 1<sup>st</sup> February 2013 until 31<sup>st</sup> December 2014 it is the statutory late payment interest rate was defined by a new governmental decree for commercial relations (Nr. 21/2013 Coll.) as a dual model: the interest rate could be calculated according to a default formula or according to an opt-in formula. Firstly, the statutory interest rate was set as the basic reference rate applied by the ECB on the first day of delay increased by 9 percentage points. This statutory interest rate is applicable for the whole period of delay which meant that the interest rate was fixed (fixed formula). However, the creditor could opt-in for a different model of calculation, according to which the late payment interest rate is calculated as the reference rate applied by the ECB on the first day of the semester in which the delay occurred, increased by 8 percentage points. Once chosen, this method of calculation of statutory late payment interest rate is applicable for the whole delay and leads to a flexible interest rate calculated every semester new (flexible formula).
- (SK.18) Since 1<sup>st</sup> January 2015, the relation between flexible and fixed formula was changed in the way that the flexible formula is the default rule for late payment interest rate and the fixed one is the opt-in model which can be claimed by the creditor.

**2.2. Is interest simple or compound? If the interest is neither simple nor compound as defined above, please elaborate.**

- (SK.19) The compensatory interest is simple, therefore the claimant cannot ask for interest on interest unless otherwise agreed by the parties.

**2.3. What is the time for which interest is calculated? When does interest start to accrue, when does the accrual of interest end? Are there any situations where the action of the plaintiff, for example delay on his part, serves to change the time for which interest is calculated? Are there provisions for suspension of the accrual of interest?**

- (SK.20) Contrary to contractual claims, there is no exact provision defining when the claim for late payment interest arises in tort law. Existing case law<sup>639</sup> consider the time when injured party ask for compensation the other party as the time when the late payment interest start to accrue. The late payment interest is a consequence of delay in performance of a monetary obligation. As the delay sets in after the obligation has not been performed by its maturity, it is necessary to establish the date when the pecuniary obligation for damages became mature. As a general rule, if no maturity has been agreed on, the creditor may ask the debtor to perform and thereby set the maturity by the day following the day his request was delivered to the debtor (§ 563 Slovak Civil Code). Therefore, the case law suggests that the debtor is in delay with the payment of a claim for damages only after he has been notified of a claim and did not perform the day after he had been notified.
- (SK.21) According to § 365 subs. 4 SCommC<sup>640</sup>, the debtor is not in delay if he is not able to fulfil his obligation due to the delay of the creditor. Therefore, while the creditor is in delay, the late payment interest does not accrue. Otherwise, the liability for delay is considered as strict liability.

<sup>639</sup> Decisions of Supreme court of Slovak republic 6 Cdo 16/2010 from 26th May 2011 or 7 M Cdo 15/2011 from 27th September 2012.

<sup>640</sup> § 365 subs. 4: “Dlužník však nie je v omeškaní, pokiaľ nemôže plniť svoj záväzok v dôsledku omeškania veriteľa.”

**2.4. Are there any specific provisions if payment is requested in a different currency than that in the state where the lawsuit is brought? (e. g. a Swedish company claims for damages resulting from an EU-wide cartel against a German cartel member in Germany. Can the court award only EUR or also Swedish Krona?)**

(SK.22) SCommC does not contain any specific provision concerning payments requested in a different currency than Euro. Civil procedural law contains a provision<sup>641</sup> which makes possible pecuniary performance expressed in foreign currency if circumstances permit and if the requested sum is denominated in foreign currency and the party liable for the performance is a resident having a foreign currency account, or one of the parties is a non-resident.

**2.5. As damage claims for infringements of EU competition rules often pertain to long-running infringements, please include all applicable interest rates and the date the rate came into force from 1 January 1985 until today. Unless impossible due to national peculiarities, the rates should be listed in a two column table, containing the rate and the date it came into force. This should be accompanied by a legal retrospective that sets out any other changes to the relevant interest regime (e.g. the time interest starts to run, etc.) which occurred over this period, in order to allow a determination of which rules applied at a given point in time between 1 January 1985 and today.**

Table 1 - Interest Rates (Example)<sup>642</sup>

Date	Rate
01.01.1993	-
02.02.2004	16.00%
01.07.2004	15.00%
01.01.2005	14.00%
01.07.2005	13.00%
01.01.2006	13.00%
01.07.2006	14.00%
01.01.2007	14.75%
01.07.2007	14.25%
01.01.2008	14.25%
01.07.2008	14.25%

<sup>641</sup> § 155 (2) of Slovak Civil Procedure Code: „(2) The term of the judgment awarding pecuniary performance may be denominated also in foreign currency where the circumstances permit, provided that a) the cause of action is denominated in foreign currency and the party liable for the performance is a resident who has a foreign currency account, or b) one of the parties is a non-resident.“ ” (2) Výrok rozsudku o plnení v peniazoch sa môže vyjadriť v cudzej mene, ak to neodporuje okolnostiam prípadu a ak a) predmet konania je vyjadrený v cudzej mene a účastník, ktorý má plniť, je devízovým tuzemcom a má účet v cudzej mene, alebo b) niektorý z účastníkov je devízovým cudzozemcom.“. This year new Code of Civil Procedures (Act no. 160/2015 Coll.) has been enacted and they come into force in June 2016 and it contains in the § 218 (2) a significant change as it will read as follows: “(2) The term of the judgment awarding pecuniary performance may be denominated also in foreign currency.” “(2) Výrok rozsudku o plnení v peniazoch sa môže vyjadriť aj v cudzej mene.”

<sup>642</sup> Late payment interest rates in this table are calculated according to mechanisms for calculation described in section 2.1. (see paras 13 –18). In the period from 1.1.1993 until 31.12.2004 interest rates were calculated only in a particular case according to average rate of loans at debtor’s seat. Since 2.1.2004 to 31.12.2008 interest rate was calculated according to interest rate of SCB available at <http://www.nbs.sk/en/statistics/data-categories-of-sdds/interest-rates/interest-rates-of-the-nbs/basic-interest-rate-of-the-nbs>. Since 1.1.2009 interest rate was calculated according to the interest rate of ECB available at <http://www.nbs.sk/sk/statisticke-udaje/udajove-kategorie-sdds/urokove-sadzby/urokove-sadzby-ecb>.

01.01.2009	12.50%
15.01.2009	10.50%
21.01.2009	10.00%
11.03.2009	9.50%
08.04.2009	9.25%
13.05.2009	9.00%
13.04.2011	9.25%
13.07.2011	9.50%
09.11.2011	9,25 %
14.12.2011	9.00%
11.07.2012	8.75%

Table 1A

Date	Rate (harm occurred before 01.02.2013)	Rate (harm occurred after 01.02.2013)
01.02.2013	8.75%	9.75%
08.05.2013	8.50%	9.50%
13.11.2013	8.25%	9.25%
11.6.2014	8.15%	9.15%
10.9.2014	8.05%	9.05%
01.01.2015	8.05%	8.05%
01.07.2015	8.05%	8.05%

(SK.23) For a legal retrospective concerning any other changes to the relevant interest regime, see above (question 2.1).

**2.2. Please identify an official, reliable, publicly available source that publishes the pertinent legal interest rates as they change.**

(SK.24) Because the calculation of interest rate is based on the main interest rate set by the European Central Bank, the interest rate changes when main interest rate set by the European Central Bank changes. The actual interest rate is also published on the website of the Ministry of Justice of the Slovak Republic, <https://www.justice.gov.sk/Stranky/Nase-sluzby/Civilne-pravo/Aktualna-sadzba-zakonnych-urokov-z-omeskania/Uvod.aspx>.

**2.3. If interest rates change on a fixed schedule, please indicate the schedule.**

(SK.25) See above (questions 2.1. and 2.5).

**2.4. If part of the debt / the damage is being paid, how is interest calculated following that payment? In particular, do partial payments first cover interest or the principal amount? Is there any provision or legal practice similar to § 86(3) (2) of the rules of application of Regulation 966/2012 on the financial rules applicable to the general budget of the Union where it is stated that “Any partial payments shall first cover the interest”?**



(SK.26) According to § 330 subs. 2 SCommC<sup>643</sup> if partial payment is made, it first covers interest and only afterwards the principal amount, unless the debtor specifies otherwise.

- 2.5. Please calculate interest in the following hypothetical case. All dates are given in the format dd.mm.yyyy. All amounts are stated without specifying the currency to abstract from implications of the introduction of the common Euro currency. Assume that the claims have not been time barred. Assume that a national court in the Member State on which you are reporting has jurisdiction to rule on the case. Assume that the cartelists are jointly liable for the damage caused by the cartel. If results differ materially depending on whether accrual of interest is based purely on national law or made in compliance with the EU principle of full compensation, provide both calculations.

There was a long running pan-European cartel for a product that materially affected trade between Member States. The cartel lasted from the beginning of 1993 until the dawn raids (unannounced inspections) of the European Commission on 02.02.2009.

On 30.11.2010, a longtime customer of the cartel, who bought the cartelised product in the Member State on which you are reporting, brings a claim for damages against three cartelists (A, B, and C). All of the three defendants have their seat in the Member State on which you are reporting. The customer only bought the cartelised product of the cartelists A and B. In the writ, the claimant specifies the damages caused by the cartel and the date on which the respective damage occurred. The claimant also specifically requests that interest be paid on the damages. The damages (always = 100) and respective dates are set out in Table 2 below. Should a subjective rate be of relevance, you will find the ROI (Return on Investment) rates of the claimant and the three defendants in Table 3 below. You will also find the average interest rate that the claimant had to pay on credit taken out in that year (claimant's average refinance rate).

On 26.11.2013 a court renders a final judgment, ordering the defendant(s) to pay damages and interest. The defendants take until 12.02.2014 to pay. Please specify the total amount the jointly liable defendants have to pay on 12.02.2014 in order to relinquish their debt towards the claimant.

Table 2 - Damage Amounts and Dates

Date the Damage Occurred	Damage Amount
15/11/1993	100
17/09/1996	100
22/02/2006	100
12/08/2008	100

Table 3 - Refinance and Return on Investment Rates

Year	Claimant's Refinance Rate	Claimant's Annual ROI	Defendant's A Annual ROI	Defendant's B Annual ROI	Defendant's C Annual ROI
1993	6.00%	5.50%	4.00%	4.00%	3.00%

<sup>643</sup> § 330 subs. 2: „Pri plnení peňažného záväzku sa započíta platenie najprv na úroky a potom na istinu, ak dlžník neurčí inak.“

„In the case of performance of a monetary (i.e. pecuniary) obligation, the payment made shall be first credited against the interest and only afterwards against the principal, unless the debtor specifies otherwise.“

1994	6.00%	9.80%	4.00%	4.00%	4.00%
1995	6.00%	9.50%	4.00%	4.00%	5.00%
1996	6.00%	1.00%	0.00%	0.00%	0.00%
1997	8.00%	-3.80%	1.00%	1.00%	3.00%
1998	8.00%	1.10%	4.00%	4.00%	5.00%
1999	8.00%	2.80%	1.00%	1.00%	3.00%
2000	8.00%	1.10%	-2.00%	-1.00%	0.00%
2001	8.00%	4.51%	2.00%	2.00%	3.00%
2002	8.00%	5.30%	4.00%	4.00%	5.00%
2003	8.00%	8.21%	9.00%	9.00%	9.00%
2004	7.00%	9.00%	3.00%	3.00%	2.00%
2005	7.00%	10.00%	1.00%	1.00%	1.00%
2006	7.00%	6.00%	1.00%	1.00%	1.00%
2007	5.00%	-5.00%	4.00%	4.00%	2.00%
2008	5.00%	-7.00%	-1.00%	0.00%	0.00%
2009	5.00%	-5.00%	2.00%	2.00%	4.00%
2010	5.00%	-3.00%	4.00%	4.00%	4.00%
2011	5.00%	-2.70%	4.00%	4.00%	2.00%
2012	5.00%	1.61%	-2.00%	-1.00%	0.00%
2013	5.00%	4.40%	8.00%	8.00%	7.00%
2014	5.00%	1.41%	-4.00%	-3.00%	-1.00%

(SK.27) Under § 381 SCommC<sup>644</sup> instead of the profit actually lost, the injured party may demand compensation for profits usually attained in fair business conduct under the conditions similar to those of the breached contract in the injured party's scope of business (so called "abstract" or "hypothetical" lost profit). In Slovak law there is no methodical instruction for exact profit loss calculation. For the hypothetical we therefore use the claimant's ROI to update the value of the damage until the time the claim was brought to court.. The annual input into the formula is the sum obtained as result from the previous year (compound interest calculated with the claimant's ROI).

As an alternative to this highly individualised calculation employing the ROI, it is conceivable to use average bank rates. The infringement could lead to further damage (loss), if the claimant had to finance his activities by an additional credit equaling the loss suffered by the infringement. The interest paid on the credit would be part of the actual damage suffered. Actual bank loan rates are highly dependent upon the credit rating of the debtor, the lending period and the collateral provided, but a basic insight can be obtained by the Slovak National bank statistics on the average lending interest rates (<http://www.nbs.sk/en/statistics/data-categories-of-sdds/interest-rates/average-lending-rates-of-commercial-banks>).. A conservative lower bound for lending costs are SCB (or, for more recent times ECB) repo rates, as all rates offered to non-financial corporations will be above the repo rate. Another possibility is using average deposit rates (see <http://www.nbs.sk/en/statistics/data-categories-of-sdds/interest-rates/average-interest-rates>).

<sup>644</sup> § 381 Commercial Code: "Namiesto skutočne ušlého zisku môže poškodená strana požadovať náhradu zisku dosahovaného spravidla v poctivom obchodnom styku za podmienok obdobných podmienkam porušenej zmluvy v okruhu podnikania, v ktorom podniká."

"Instead of actually lost profits aggrieved party may claim compensation for profit achieved generally in fair trade under contractual conditions similar to breached contract conditions, within the business in which aggrieved party operates."

on-domestic-currency-denominated-deposits), which reflect the interest that could have been earned on the funds not in possession of the claimant.

- (SK.28) Late payment interest should be calculated from the time the claimant demands payment from the debtors. We consider the date the claim was brought to court by the claimant as the date on which compensation is requested. We assume that the debtor received the notice and request to perform his obligation on the day the claim was brought. Therefore interest is calculated as from the next day, the 1.12.2010. Because of the regulation applicable at the time the debtor fell into delay (see para ), the interest rate is calculated as the basic reference rate applied by the ECB on the first day of delay increased by 8 percentage points. In principle, this reference rate continues to apply for the entire time, until the debt is paid (see para (16)).<sup>645</sup> An exception to that is stipulated in § 3 (2) of the decree: For any calendar half-year in which the ECB reference rate rises more than one percentage point above the level of the time the default commenced, the interest rate for the calendar half-year in which this increase took place is instead determined by this higher ECB reference rate plus seven percentage points. As the changes of the reference rates within the specified period plus 7 percentage points were never better for the creditor than the initially calculated fixed late payment interest rate, the fixed rate applies for the entire duration of the debtor's delay.

#### Damage 1

From	To	Total Amount(damnum emergens + lucrum cesans)
15.11.1993	30.11.2010	152.72

#### Damage 2

From	To	Total Amount (damnum emergens + lucrum cesans)
17.09.1996	30.11.2010	125.24

#### Damage 3

From	To	Total Amount (damnum emergens + lucrum cesans)
22.02.2006	30.11.2010	100.00

#### Damage 4

From	To	Total Amount (damnum emergens + lucrum cesans)
12.08.2008	30.11.2010	100.00

- (SK.29) Under the calculation of Damage 3 and Damage 4 are lost profits negative therefore the claimant does not have any *lucrum cesans* which he can ask for. Total amount of damage in that case equals to damnum emergens (100) as the lost profit does not have an impact on the other portion of the claim – the loss actually suffered. Although lacking any case-law or

<sup>645</sup> In general, according to rules on temporal effect of laws the liabilities including the obligation to pay late payment interest any change in legislation does not have an effect on the calculation. The regulation of late payment interest applicable at the time of the delay applies during the whole period of delay as the new law does not apply retroactively, not even indirectly (see in particular § 763a SCommC regarding the amendment in effect since 2004, § 10a of the government decree Nr. 87/1995 Coll. regarding the amendment in effect since 2009, § 3 of the government decree Nr. 21/2013 Coll. . regarding the amendment in effect since 2013).

doctrinal opinion on the effect of negative ROI on the calculation of loss profit, the authors assume, that any negative economic results have impact only on the calculation of lost profit, not the actual damage sustained. The assumption is based on analogy to the doctrine within the causation theory according to which the tortfeasor is not freed from the liability for damage he caused if later, unrelated events caused the same damage. Therefore the negative ROI should not have the effect of reducing the actual loss suffered by the claimant but should be reflected only within the calculation of loss profit. Both these portions are assessed – to an extent – separately.

- (SK.30) The total sum awarded by the judge should be 400 (*damnum emergens*) plus 77.96 (*lucrum cessans*). On this sum, interest for late payment is to be calculated from the day the claim has been brought.

From	To	Amount	Interest Rate	Total Days	Interest
01.12.2010	12.02.2014	477.96	9.00%	1170	137.89

As a conclusion, the overall sum due by the debtor(s) on 12 February 2014 is 615.85.

### Section III. Procedural Aspects

- 3.1. What are the procedures for the party seeking to receive interest on the damages paid? (e. g. does the claimant have to make a separate plea for the interest payments and if so, what information and evidence must be supplied? Does the judge award interest *ex officio* or does the claimant have to request it?).**

- (SK.31) The claimant has to demand late payment interest by a separate plea (separated from the principal amount). The claimant has to supply evidence for the principal amount and for the delay of the defendant. The delay of the defendant is the period until the debtor performs his obligation to pay damages (and not the duration of his competition law infringement). As the interest rate is calculated in an objective way, he has not to produce any specific evidence.

- 3.2. Can the judge award a higher interest amount than requested by the claimant or does the principle of *ne ultra petita* apply?**

- (SK.32) The principle of *ne ultra petita* applies. Claimant cannot be awarded more than he requested, however claimant doesn't have to specify the exact amount of interest. He must specify only interest rate and the date since he requests interest until the complete payment.

- 3.3. Can the judge estimate interest or does interest always have to be calculated?**

- (SK.33) At present, the interest rate is calculated according to the above mentioned Government decree.

- (SK.34) While distinguishing between *damnum emergens* and *lucrum cessans*, only the latter one can be requested as "hypothetical" *lucrum cessans* (§ 381 SCommC). This regulation of contractual liability applies also to tortious claims (§ 757 SCommC).

(SK.35) According to the § 136 Code of Civil Procedure<sup>646</sup> where the value of a claim can be established only at the cost of unreasonable difficulties or cannot be established at all, the court shall establish it at its discretion. The rule applies for both contractual and tortious claims. This is a special case of awarding the claimant on equitable base.

(SK.36) Because at the time of the judgment, the date of payment by the debtor is not yet known, the court will usually only specify how interest is to be calculated and will leave the calculation itself to the parties.

**3.4. If the claimant changes the request regarding the interest, is this regarded as an amendment of the pleadings? Is this only possible until a certain stage into the proceedings and precluded later on or can the claimant make such changes without negative procedural consequences at any time up to the judgment?**

(SK.37) After first oral hearing was held, plaintiff can change his pleading only with the court approval.<sup>647</sup> Plaintiff can withdraw (reduce scope) his pleading until judgment on merits was given.<sup>648 649</sup>

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<sup>646</sup>The actual version of this provision reads as follows: “Ak možno výšku nárokov zistiť len s nepomernými ťažkosťami alebo ak ju nemožno zistiť vôbec, určí ju súd podľa svojej úvahy.” “Where the value of a claim can be established only at the cost of unreasonable difficulties or cannot be established at all, the court shall establish it at its discretion.”

According to new Code of Civil Procedures this provision will be part of § 264 para. 2 (in Act 160/2015 Coll.). This reads as follows: “Ak možno hodnotu nárokov alebo hodnotu, ktorá má byť základom na výpočet súdneho poplatku, zistiť len s nepomernými ťažkosťami alebo ak ju nemožno zistiť vôbec, určí ju súd podľa svojho odhadu.”

<sup>647</sup> § 95 of Slovak Civil Code Procedure: “(1) Navrhovateľ môže za konania so súhlasom súdu meniť návrh na začatie konania. Zmenený návrh treba ostatným účastníkom doručiť do vlastných rúk, pokiaľ neboli prítomní na pojednávaní, na ktorom došlo k zmene. (2) Súd nepripustí zmenu návrhu, ak by výsledky doterajšieho konania nemohli byť podkladom pre konanie o zmenenom návrhu. Súd nepripustí zmenu návrhu ani v prípade, ak by na konanie o zmenenom návrhu bol vecne príslušný iný súd. V takom prípade pokračuje súd v konaní o pôvodnom návrhu po právoplatnosti uznesenia. (3) O zmene návrhu súd rozhodne spravidla na pojednávaní, na ktorom bola zmena navrhnutá. Ak to nie je možné, súd rozhodne do 15 dní od odročenia pojednávania. O zmene návrhu mimo pojednávania súd rozhodne do 60 dní od podania návrhu na zmenu návrhu.”

“(1) Subject to the consent of the court, the claimant may amend the petition to commence proceedings. The amended petition shall have to be personally served on all other parties who did not attend the hearing at which the amendment took place. (2) The court shall not allow amendment of the petition if the results obtained in the proceedings up to that moment cannot be used in the proceedings on the petition thus amended. The court shall then resume proceedings on the original petition as soon as the resolution to this effect becomes effective.”

<sup>648</sup> Actual provision § 96 of Slovak Civil Code Procedure: „(1) Navrhovateľ môže vziať za konania späť návrh na jeho začatie, a to sčasti alebo celkom. Ak je návrh vzatý späť celkom, súd konanie zastaví. Ak je návrh vzatý späť sčasti, súd konanie v tejto časti zastaví. (2) Súd konanie nezastaví, ak odporca so späťvzatím návrhu z vážnych dôvodov nesúhlasí; v takom prípade súd po právoplatnosti uznesenia pokračuje v konaní. (3) Nesúhlas odporcu so späťvzatím návrhu nie je účinný, ak dôjde k späťvzatiu návrhu skôr, než sa začalo pojednávanie, alebo ak ide o späťvzatie návrhu na rozvod, neplatnosť manželstva alebo určenie, či tu manželstvo je alebo nie je. V takomto prípade súd rozhodne o zastavení konania do 30 dní od späťvzatia návrhu.“

„(1) At any time during the proceedings the claimant may withdraw his petition to commence proceedings in whole or in part. If the petition is withdrawn in whole, the court shall stay the proceedings. If the petition is withdrawn in part, the court shall stay the proceedings concerning the relevant part of the

petition. (2) The court shall not stay the proceedings if the defendant has serious reasons not to give his consent with the withdrawal of the petition; in such case, the court shall resume the proceedings as soon as the resolution to this effect becomes effective. (3) Disapproval of the defendant with the withdrawal of the petition shall not be effective if the petition is withdrawn before the commencement of the trial or in the petitions concerning divorce, annulment of marriage or determination whether or not the marriage exists.“

<sup>649</sup> See for example judgement of Slovak Supreme Court 1 Cdo 51/2009 from 22<sup>nd</sup> September 2010.

#### Section IV. Specific Instances

##### 4.1. Identify any cases relating to damages claims for infringements of competition law and explain how interest was calculated. In writing these summaries, provide all relevant information about how interest and other compensation for the effluxion of time was calculated.

- (SK.38) In Slovakia, it is rather uncommon, for businesses and individuals / consumers who have suffered losses due to an infringer's breach of competition rules, to bring forth an action for damages before the Slovak courts. Unsurprisingly then, there is a substantial lack of relevant case-law which would offer guidance or even so much as an outlook of how the matter at hand should be decided upon.
- (SK.39) A necessary preliminary point to be made in connection with the below judgment is that the Slovak legal order distinguishes between infringement of competition rules as defined in the act No. 136/2001 Coll. Competition Act, and unfair competition as defined in Sec. 44 of the act No. 513/1991 Coll. Commercial Code. Whereas the act on protection of competition is an instrument against prevention, restriction and distortion of competition, Sec. 44 of the Commercial Code serves as the general clause prohibiting unfair competition.
- (SK.40) The First Competition Act was enacted in 1991 after The Velvet revolution in November 1989. Before this time, the economy of the Slovak republic was directive economy, so there was no need for regulation of free market competition. This act contained provision on private actions, according to:
- “Those whose rights have been infringed by unlawful restriction of competition, may require against violators to refrain from unlawful conduct, remedy the unlawful state, and provide appropriate compensation, damages and unjust enrichment.<sup>650</sup>”
- (SK.41) The protection of competition has been primarily regarded as a public good. In court's decisions related to compensation of damages, is preferred direct causal nexus between unlawful act and damage, which is tested as condition *sine qua non*<sup>651</sup>, and for that reason it is difficult to prove that damage on competition is also a damage on private party. The burden of proof lies on plaintiff.
- (SK.42) The second competition act enacted in 1994 comprised a specific provision providing consumers with a claim for damages for infringement of competition law.<sup>652</sup> However, their motivation to litigate is usually very low due to costs, duration of the proceedings and small individual damages.

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<sup>650</sup> § 17 Competition Act 63/1991 Coll. Reads as follows: “Tí, ktorých práva boli nedovoleným obmedzením súťaže porušené, môžu voči rušiteľovi požadovať, aby sa zdržal konania, odstránil závadný stav, poskytol primerané zadosťučinenie, nahradil škodu a vydal neoprávnený majetkový prospech. Pre uplatňovanie týchto nárokov platia ustanovenia občianskoprávných predpisov, pokiaľ tento zákon neustanovuje inak.”

<sup>651</sup> Decision of Supreme court of Slovak republic 2 M Cdo 1/2007 from 29<sup>th</sup> January 2008. See also Králik, A. *Náhrada škody spôsobenej porušením súťažného práva*. Bratislava, C.H. Beck, 2014, p.116.

<sup>652</sup> Competition Act 188/1994 Coll. § 17 sec. 1: “Spotrebitelia, ktorých práva boli porušené nedovoleným obmedzovaním súťaže, môžu voči rušiteľovi požadovať, aby sa zdržal konania a odstránil závadný stav. Toto právo môže uplatniť aj právnická osoba oprávnená hájiť záujmy spotrebiteľov.

- (SK.43) The current Competition Act 136/2001 does not contain any specific provision which serves as a legal basis for the right to damages and related rights in case of breach of competition law rules.
- (SK.44) The only judgment dealing with a claim for damages due to an infringement of Slovak competition law somewhat relevant to this research study, is that of the Slovak Supreme Court 1 Obdo V 19/2007. A repeal of the Bratislava County court's judgment, the Supreme Court held that in order to successfully claim damages arisen out of infringement of competition law (which in this case amounted to the defendant having acted in breach of the general clause of the law on unfair competition), the claimant and the defendant had had to be competitors. The court made a clear distinction between, on the one hand, the administrative proceedings initiated and decided upon by the Antimonopoly office of the Slovak republic and, on the other hand, civil proceedings for breaches of the unfair competition general clause. However, the Supreme Court did not specify whether they needed to be actual competitors, or, whether it suffices that they be potential competitors. Moreover, the award of damages, its extent and the question of calculation of interest were left untouched by the Supreme Court.

**4.2. Are the rules on the award of interest specific to the kinds of claim or general principles? Are there any specific approaches/rules that you can identify in national or EU competition cases, or in other cases where the claim is brought by business against business (B2B) and are there any specific approaches/rules in business versus consumer (B2C) cases?**

- (SK.45) Slovak private law is built upon dualistic model of regulation. Civil Code, which is a *lex generalis* of private law is supplemented with specific regulation for B2B relationships enacted in Commercial Code. In any event, infringement of Competition law should be considered as a breach of non-contractual duty imposed by Commercial code (§ 41 in conjunction with § 757 SCommC).

***Section V. Evaluation, Interpretation in conformity with EU Law, and Intertemporal Aspect***

**5.1. Throughout the reports, evaluate how satisfactory are the rules on the calculation of interest perceived to be? In considering this question, identify any law reform proposals in the last 15 years or so, or any major judgments by the higher courts that call into question or change some of the issues pertaining to the award of damages. Please identify changes of relevant national law on interest that will come into force or are currently considered.**

- (SK.46) Last amendments of the Competition Act was enacted last year<sup>653</sup> due to development in ECJ decision making, but the effect of this amendment is not relevant for the calculation of interest.
- (SK.47) There have been far too few judgments (only one known existent) delivered to be able to identify a pattern opted for by the courts with respect to compensation for breaches of either EU or national competition law.
- (SK.48) Also, there have been no legislative proposals brought forth seeking to implement the directive 2014/104/EU, or at least ones made available to the public.<sup>654</sup> One might only guess what the legislator's and, subsequently the courts' approach is going to be.

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<sup>653</sup> Act No. 151/2014 Coll. which changes and amends Competition Act and other related Acts.

**5.2. For each question, where it is relevant, assess the compliance of the national interest rules with the minimum standard prescribed by EU law ('full compensation'). If national law does not grant full compensation, please try to identify an interpretation of national law that guarantees full compensation in conformity with European law.**

(SK.49) As far as interest will be calculated as from the date when the debtor is in delay with the performance of a pecuniary obligation (to pay damage) we consider the Slovak legislation as being in compliance with minimum standard prescribed by EU law. The loss of profits is calculated separately.

**5.3. Finally, when assessing the overall compliance of national law with the principle of full compensation based on directly applicable EU law, please confirm that national courts have to apply it also in relation to past infringements of EU competition law or the equivalent provisions of the EEA agreement (e.g. cartels starting in the 1990ies and ending in the 2000er years).**

(SK.50) Because there are no relevant cases in this matter we can only guess what the approach to full compensation could be in cases where EU competition law were brought.

**5.4. Regarding the secondary subject of investigation (interest on damages due to infringements of national competition law only) Recital 12 of the preamble of Directive 2014/104/EU summarizes the EU law principles regarding interest as follows:**

*"Anyone who has suffered harm caused by an infringement can claim compensation for the actual loss (damnum emergens), for the gain of which he has been deprived (loss of profit or lucrum cessans) plus interest. This is irrespective of whether the national rules define these categories separately or in combination. The payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time, and it should be due from the time the harm occurred until compensation is paid, without prejudice to the qualification of such interest as compensatory or default interest under national law. This is also without prejudice to whether effluxion of time is taken into account as a separate category (interest) or as a constituent part of actual loss of profit. It is incumbent on the Member States to lay down the rules to be applied for that purpose".*

**Would the right to full compensation as set out by Recital 12 of the proposed directive apply to interest calculation for damages in cases where only national competition law has been infringed and the damage occurred before the implementation of the directive came into force?**

(SK.51) The principle of full compensation has been already established in Slovak tort law, applies also in cases where only national competition law. There are no reasons for different treatment in cases of competition law infringement, as there are treated as the breach of Commercial Code provisions, with same regime of compensation.

(Contd.) \_\_\_\_\_

<sup>654</sup> Only doctrine has made such a guide how to make a transposition of damages directive into Slovak legal order. See Zavadova, D. Justičná revue 8-9/2015. Králik, A. Bulletin SAK, 7-8/2015.





## Spain

Alexandre Ruiz Feases \*

### *Preliminary Matters*

- (ES.1) Former Spanish Competition Act 16/1989 only allowed follow-on actions. Nonetheless, the new Competition Act 15/2007 makes no difference between follow-on and stand-alone actions.
- (ES.2) Additionally, the current Spanish Competition Act gives jurisdictional authority to the commercial courts - a specialized first instance - to apply Spanish and EU competition rules equally<sup>655</sup>.
- (ES.3) Spanish case-law has settled that first instance courts are the only ones allowed to assess evidence - i.e. economic reports evaluating damages - and determine the amount of the claim. Unfortunately, neither public case-law databases nor private ones have a considerable compilation of first instance judgements as they are considered as case-law of minor importance.
- (ES.4) To date, most of Spanish legal practice concerning private enforcement was about nullity of long-term agreements, as in the Spanish service station cases, and, only in a subsidiary way about damages. Hence, the two Supreme Court judgements rendered in the Spanish sugar cartel case in 2012 and 2013 are benchmark cases on private enforcement and damages claims.

### *Section I. General Principles*

#### **1.1. What is interest? Is there a definition?**

- (ES.5) Despite the fact that several Spanish statutes refer to the concept of interest, no definition is provided.
- (ES.6) Spanish legal doctrine distinguishes between three different categories: (A) ordinary or agreed interest; (B) delay or default interest; and (C) procedural delay interest.
- (ES.7) The ordinary or agreed interest (A), according to the Supreme Court, is the one arranged by the parties to a contract.<sup>656</sup> It has a double function. On one hand, it works as remuneration; on the other hand, it compensates currency depreciation.
- (ES.8) The delay or default interest (B) starts to accrue when the debtor falls into arrears of payment.<sup>657</sup> It is said to have the objectives of compensating damage to the creditor caused by

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<sup>655</sup> See Art. 86(ter)(2)(f) of the Judiciary Power Organic Law 6/1985, together with the 1<sup>st</sup> Additional Disposition of the Competition Act 15/2007.

<sup>656</sup> Judgement of the Supreme Court (First Chamber) No. 86/1997 of 15 February 1997.

the delay in the payment, and as well as avoiding unjust enrichment of the debtor and thus incentivizing prompt payment.

- (ES.9) The procedural delay interest (C) starts to accrue from the judgement of first instance if the judgment awards a sum of money and the sentenced debtor does not pay voluntarily.<sup>658</sup> Its function is again compensatory, but it has also a punitive nature as it is the legal interest rate plus two percentage points (see Table 1 in question 2.5).
- (ES.10) While ordinary and default interest (A and B) have to be sought *ex parte*, procedural delay interest (C) is granted *ex officio*.
- (ES.11) However, a clarification is needed. When dealing with cases about cartel damages, the concept of interest approaches the notion of damages and loss of profits. The aim here is to get full compensation. Therefore, we talk neither about procedural delay interest (C), nor default interest (B), nor ordinary interest (A), but about interest with the functions of compensating the loss of the purchasing power of the currency and to avoid unjust enrichment of the cartel.
- (ES.12) Three periods should be distinguished. The first period (i) runs from the moment the harm occurred until the date the claim is brought to court. Here, interest is applied to update the amount. As it can be calculated up to the date of the claim, the claimant must demand damages and loss of profits already updated according to the legal interest.
- (ES.13) Nonetheless, note that tort case-law has also admitted that the update can be made according to other factors, as the consumer price index, instead of the legal interest.<sup>659</sup>
- (ES.14) The second period (ii) runs from the day the claim was filed up to the moment of the first instance judgment. Here, courts apply a default interest (B), but it must be explicitly requested in the claim.
- (ES.15) The third period (iii) runs from the date of the judgement until the date the debt is totally paid. In this third period, procedural delay interest (C) is applied *ex officio*.
- (ES.16) For the next questions, we will refer to the different kinds of interest as A, B and C and to the different periods as i, ii and iii.

(Contd.) \_\_\_\_\_

<sup>657</sup> See Art. 1108 of the Civil Code. See also the judgement of the Supreme Court (First Chamber) No. 843/2011 of 23 November 2011.

<sup>658</sup> See Art. 576(1) of the Civil Procedural Act 1/2000, which reads as follows: “From its announcement, every judgement or decision awarding the payment of a liquid sum of money will determine, in favour of the creditor, the accrual of an annual interest equivalent to the legal interest plus two points or whichever it corresponds because of an agreement between parties or a special legal disposition”.

<sup>659</sup> Judgement of the Supreme Court (First Chamber) No. 123/2015 of 4 March 2015. Sometimes other factors are used to update the amount. See for example the case on Spanish Insurance Property Cartel (commented on below in question 4.1), where the claimant applied the average rate of the State Treasury bonds for five years instead of the legal interest.

**1.2. When, and under what conditions, is interest payable at all? Does this depend on whether the claim is brought in tort, breach of contract or (where applicable) restitution/unjust enrichment?**

(ES.17) With regard to cartel damages matters, we are within the scope of tort law where there exist the full compensation principle and unjust enrichment correction (*nemo debet lucrari ex alieno damno*<sup>660</sup>). Art. 1106<sup>661</sup> and 1902<sup>662</sup> of the Civil Code devoted to non-contract civil liability are applicable here.

**1.3. Is payment of interest compulsory or at the discretion of the court?**

(ES.18) On one hand, both the updating interest (A) and the default interest (B) shall be sought *ex parte* and explicitly in the claim. In general terms, in Spain the adversarial principle rules on civil issues.<sup>663</sup> The court cannot grant more than what was sought. On other hand, the court awards procedural delay interest (C) compulsorily (see question 1.1).

**1.4. What is said to be the purpose of the interest payment?**

(ES.19) As said, for cartel damages claims, the purpose of the interest payment is to achieve full compensation and avoid unjust enrichment of the cartelists.

(ES.20) During the first period (i), interest updates the damages up to the date of the claim. During the second period (ii), interest compensates the time consumed by the civil court proceedings. During the third period (iii), interest does not only compensate the time until the debt is paid, but also punishes the delay.

**1.4. What is the legal basis for the payment of interest (statutes, contractual agreements, case-law, soft law guidance)?**

(ES.21) For the first period (i), there is case-law specifically on cartel damages where the damages and loss of profits are updated according to the legal interest rate (see the Spanish sugar cartel, question 4.1).

(ES.22) For the second period (ii), the case-law on tort law normally invokes Art. 1108 of the Civil Code.<sup>664</sup>

(ES.23) In relation to the third period (iii), it is Art. 576(1) of the Civil Procedural Act 1/2000<sup>665</sup> that contemplates the procedural delay interest.

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<sup>660</sup> Judgement of the Supreme Court (First Chamber) No. 559/2010 of 21 September 2010.

<sup>661</sup> Art. 1106 of the Civil Code reads as follows: “Damage compensation covers not only the value of the loss suffered, but also the value of the loss of profits of the creditor, except the dispositions stated by the following articles”.

<sup>662</sup> Art. 1902 of the Civil Code reads as follows: “Who causes harm to another by action or inaction, by negligence or fault, is obliged to repair the harm caused”.

<sup>663</sup> See Art. 216 of the Civil Procedural Act 1/2000.

<sup>664</sup> Art. 1108 of the Civil Code reads as follows: “If the obligation consists on the payment of a sum of money, and the debtor falls into arrears, the compensation, if there is no agreement between parties, will consist on the payment of the interest agreed, and if not, on the legal interest”.

<sup>665</sup> *Supra* note 4.

## Section II. Calculation of Interest

### 2.1. What is the rate of interest that is set? How is it arrived at? Are there statutes?

(ES.24) It follows from Art. 1 of the Legal Interest Modification Act 24/1984 that the Spanish Parliament shall set the legal interest rate yearly through the General Budget Annual Act.

### 2.2. Is interest simple or compound? If the interest is neither simple nor compound as defined above, please elaborate.

(ES.25) Generally, the Spanish Law system considers interest simple. There is an exception in Art. 1109 of the Civil Code, which states the possibility *ex officio* to capitalize the interest accrued and apply new default interest upon the total sum. Nevertheless, this article does not apply to private competition matters.<sup>666</sup>

(ES.26) In any case, it should be noted that the default interest (B) which applies to the second period (ii) is directly calculated on the amount already updated for the first period (i). In other words, the legal interest is calculated upon the total sum claimed (see example in question 2.9).

(ES.27) As example, it can be observed the judgement of the Supreme Court no. 344/2012 in the case of the Sugar Cartel. Here, the Supreme Court approved firstly the fact that the claimant already added the interest for the first period (i) to the damages in her\his writ and secondly that the Court of Appeal granted interest for the second period (ii) to be calculated on the damages plus the interest for the first period (i).<sup>667</sup>

### 2.3. What is the time for which interest is calculated? When does interest start to accrue, when does the accrual of interest end? Are there any situations where the action of the plaintiff, for example delay on his part, serves to change the time for which interest is calculated? Are there provisions for suspension of the accrual of interest?

(ES.28) As stated above, the claimant shall indicate the amount on her\his claim (or, if impossible, provide the court with a formula to be applied), and the expert economic report should update the *damnum emergens* and the *lucrum cessans* according to the legal interest rate. Then, there would be a second (ii) and a third period of calculation (iii) (see above). For each period, the legal interest rate in force at that time is applied, meaning that the applicable rate changes each time the legal interest rate changes.

(ES.29) There is no provision that changes the calculation time because of any action of the plaintiff. However, the Spanish Supreme Court has developed a doctrine in tort law called “unfair delay” (“*retraso desleal*” in Spanish), according to which interest can be reduced if the court considers that the plaintiff intentionally delayed the bringing of an action to increase agreed (A) or default (B) interest upon the sum due. Nevertheless, this doctrine is unlikely to be invoked on competition matters.

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<sup>666</sup> Specifically, the Supreme Court stated that Art. 1109 of the Civil Code does not apply to imperative rules, making reference to competition rules. See judgement of the Supreme Court (First Chamber) No. 344/2012 of 8 June 2012 (*Sugar Cartel I*, commented in question 4.1).

<sup>667</sup> See Paragraph No. 18 of the cited judgement of the Supreme Court. See also the previous judgement of the Court of Appeal of Valladolid No. 261/2009 of 9 October 2009.

**2.4. Are there any specific provisions if payment is requested in a different currency than that in the state where the lawsuit is brought? (e.g. a Swedish company claims for damages resulting from an EU-wide cartel against a German cartel member in Germany. Can the court award only EUR or also Swedish Krona?)**

(ES.30) There is no provision that precludes awarding an amount in a different currency. Nevertheless, court costs and procedural delay interest (C) will be calculated in Euro.<sup>668</sup>

(ES.31) Note that the Supreme Court has stated that, for future proceedings in the same case, courts will take into consideration the currency exchange rate valid on the day when the claim was filed.<sup>669</sup> This is important as the right to appeal against the first judgement and the cassation to the Supreme Court will depend on the first amount set.

**2.5. As damage claims for infringements of EU competition rules often pertain to long-running infringements, please include all applicable interest rates and the date the rate came into force from 1 January 1985 until today. Unless impossible due to national peculiarities, the rates should be listed in a two column table, containing the rate and the date it came into force. This should be accompanied by a legal retrospective that sets out any other changes to the relevant interest regime (e.g. the time interest starts to run, etc.) which occurred over this period, in order to allow a determination of which rules applied at a given point in time between 1 January 1985 and today.**

Table 1 - Interest Rates

Date	Legal Interest Rate	Procedural Interest Rate
01/01/1985	11.00%	13.00%
01/01/1986	10.50%	12.50%
01/01/1987	9.50%	11.50%
01/01/1988	9.00%	11.00%
01/01/1989	9.00%	11.00%
01/01/1990	9.00%	11.00%
30/06/1990	10.00%	12.00%
01/01/1991	10.00%	12.00%
01/01/1992	10.00%	12.00%
01/01/1993	10.00%	12.00%
01/01/1994	9.00%	11.00%
01/01/1995	9.00%	11.00%
01/01/1996	9.00%	11.00%
01/01/1997	7.50%	9.50%
01/01/1998	5.50%	7.50%
01/01/1999	4.25%	6.25%
01/01/2000	4.25%	6.25%
01/01/2001	5.50%	7.50%
01/01/2002	4.25%	6.25%
01/01/2003	4.25%	6.25%

<sup>668</sup> See Art. 577(1) of the the Civil Procedural Act 1/2000.

<sup>669</sup> See Orders of the Supreme Court of 4 November 1997 and of 5 October 1999.

01/01/2004	3.75%	5.75%
01/01/2005	4.00%	6.00%
01/01/2006	4.00%	6.00%
01/01/2007	5.00%	7.00%
01/01/2008	5.50%	7.50%
01/01/2009	5.50%	7.50%
01/04/2009	4.00%	6.00%
01/01/2010	4.00%	6.00%
01/01/2011	4.00%	6.00%
01/01/2012	4.00%	6.00%
01/01/2013	4.00%	6.00%
01/01/2014	4.00%	6.00%
01/01/2015	3.50%	5.50%
01/01/2016	3.00%	5.00%

(ES.32) According to the recent General Budget Annual Act for 2016, the legal interest rate will be 3.00% until 31 December 2016.<sup>670</sup>

**2.6. Please identify an official, reliable, publicly available source that publishes the pertinent legal interest rates as they change.**

(ES.33) The Spanish Parliament sets the legal interest rate through the General Budget Annual Act, which is published in the State's Official Journal (*Boletín Oficial del Estado*) and it is available online at [http://www.boe.es/diario\\_boe](http://www.boe.es/diario_boe) (in Spanish).

(ES.34) Additionally, the Spanish National Bank releases the legal interest rates valid since 1995 at [http://www.bde.es/clientebanca/es/areas/Tipos\\_de\\_Interes/Tipos\\_de\\_interes/Otros\\_tipos\\_de\\_i/otros-tipos/Tabla\\_tipos\\_de\\_interes\\_legal.html](http://www.bde.es/clientebanca/es/areas/Tipos_de_Interes/Tipos_de_interes/Otros_tipos_de_i/otros-tipos/Tabla_tipos_de_interes_legal.html) (in Spanish).

**2.7. If interest rates change on a fixed schedule, please indicate the schedule.**

(ES.35) Normally, the legal interest rate is set yearly. However, Art. 2 of the Legal Interest Modification Act 24/1984 allows to the Spanish Government to change the rate during the year if the circumstances require it. In fact, this already happened in 1990 and more recently in 2009 (see question 2.5).

**2.8. If part of the debt / the damage is being paid, how is interest calculated following that payment? In particular, do partial payments first cover interest or the principal amount? Is there any provision or legal practice similar to Art. 86(3)(2) of the rules of application of Regulation 966/2012 on the financial rules applicable to the general budget of the Union where it is stated that “Any partial payments shall first cover the interest”?**

(ES.36) In the light of Article 1173 of the Spanish Civil Code,<sup>671</sup> if the debt generates interest, any partial payment is firstly imputed to the interest and, once this has been covered, future payments are imputed to the principal amount.

<sup>670</sup> See 34<sup>th</sup> Additional Disposition of the General Budget Annual Act for 2016 approved the 20 October 2015 by the Spanish Parliament.

<sup>671</sup> Art. 1173 of the Civil Code reads as follows: “If the debt generates interest, the payment of the principal amount cannot be considered as done until the interests have been covered”.

(ES.37) Due to the lack of *lex specialis* for antitrust damages claims, this article would apply as it is the common law regime.

- 2.9. Please calculate interest in the following hypothetical case. All dates are given in the format dd.mm.yyyy. All amounts are stated without specifying the currency to abstract from implications of the introduction of the common Euro currency. Assume that the claims have not been time barred. Assume that a national court in the Member State on which you are reporting has jurisdiction to rule on the case. Assume that the cartelists are jointly liable for the damage caused by the cartel. If results differ materially depending on whether accrual of interest is based purely on national law or made in compliance with the EU principle of full compensation, provide both calculations.

There was a long running pan-European cartel for a product that materially affected trade between Member States. The cartel lasted from the beginning of 1993 until the dawn raids (unannounced inspections) of the European Commission on 02.02.2009.

On 30.11.2010, a longtime customer of the cartel, who bought the cartelised product in the Member State on which you are reporting, brings a claim for damages against three cartelists (A, B, and C). All of the three defendants have their seat in the Member State on which you are reporting. The customer only bought the cartelised product of the cartelists A and B. In the writ, the claimant specifies the damages caused by the cartel and the date on which the respective damage occurred. The claimant also specifically requests that interest be paid on the damages. The damages (always = 100) and respective dates are set out in Table 2 below. Should a subjective rate be of relevance, you will find the ROI (Return On Investment) rates of the claimant and the three defendants in Table 3 below. You will also find the average interest rate that the claimant had to pay on credit taken out in that year (claimant's average refinance rate).

On 26.11.2013 a court renders a final judgment, ordering the defendant(s) to pay damages and interest. The defendants take until 12.02.2014 to pay. Please specify the total amount the jointly liable defendants have to pay on 12.02.2014 in order to relinquish their debt towards the claimant.

Table 2 - Damage Amounts and Dates

Date the Damage Occurred	Damage Amount
15/11/1993	100
17/09/1996	100
22/02/2006	100
12/08/2008	100

Table 3 - Refinance and Return on Investment Rates

Year	Claimant's Refinance Rate	Claimant's Annual ROI	Defendant's A Annual ROI	Defendant's B Annual ROI	Defendant's C Annual ROI
1993	6.00%	5.50%	4.00%	4.00%	3.00%
1994	6.00%	9.80%	4.00%	4.00%	4.00%
1995	6.00%	9.50%	4.00%	4.00%	5.00%
1996	6.00%	1.00%	0.00%	0.00%	0.00%



1997	8.00%	-3.80%	1.00%	1.00%	3.00%
1998	8.00%	1.10%	4.00%	4.00%	5.00%
1999	8.00%	2.80%	1.00%	1.00%	3.00%
2000	8.00%	1.10%	-2.00%	-1.00%	0.00%
2001	8.00%	4.51%	2.00%	2.00%	3.00%
2002	8.00%	5.30%	4.00%	4.00%	5.00%
2003	8.00%	8.21%	9.00%	9.00%	9.00%
2004	7.00%	9.00%	3.00%	3.00%	2.00%
2005	7.00%	10.00%	1.00%	1.00%	1.00%
2006	7.00%	6.00%	1.00%	1.00%	1.00%
2007	5.00%	-5.00%	4.00%	4.00%	2.00%
2008	5.00%	-7.00%	-1.00%	0.00%	0.00%
2009	5.00%	-5.00%	2.00%	2.00%	4.00%
2010	5.00%	-3.00%	4.00%	4.00%	4.00%
2011	5.00%	-2.70%	4.00%	4.00%	2.00%
2012	5.00%	1.61%	-2.00%	-1.00%	0.00%
2013	5.00%	4.40%	8.00%	8.00%	7.00%
2014	5.00%	1.41%	-4.00%	-3.00%	-1.00%

(ES.38) In the following tables calculations are reported. From Table 5 to Table 8 it can be seen the update of each damage until the date of the claim (30.11.2010). A résumé showing the total sum is provided in Table 9.

(ES.39) From Table 5 to Table 10 the legal interest rate has been applied. In Table 11, the procedural interest rate has been applied, which is the legal interest rate plus two percentage points (see Table 1 in question 2.5).

Table 5 (1<sup>st</sup> Period - Damage 1)

From	To	Amount	Interest Rate	Total Days	Days in a Year	Interest
15/11/1993	31/12/1993	100.00	10.00%	47	365	1.29
01/01/1994	31/12/1994	100.00	9.00%	365	365	9.00
01/01/1995	31/12/1995	100.00	9.00%	365	365	9.00
01/01/1996	31/12/1996	100.00	9.00%	366	366	9.00
01/01/1997	31/12/1997	100.00	7.50%	365	365	7.50
01/01/1998	31/12/1998	100.00	5.50%	365	365	5.50
01/01/1999	31/12/1999	100.00	4.25%	365	365	4.25
01/01/2000	31/12/2000	100.00	4.25%	366	366	4.25
01/01/2001	31/12/2001	100.00	5.50%	365	365	5.50
01/01/2002	31/12/2002	100.00	4.25%	365	365	4.25
01/01/2003	31/12/2003	100.00	4.25%	365	365	4.25
01/01/2004	31/12/2004	100.00	3.75%	366	366	3.75
01/01/2005	31/12/2005	100.00	4.00%	365	365	4.00
01/01/2006	31/12/2006	100.00	4.00%	365	365	4.00
01/01/2007	31/12/2007	100.00	5.00%	365	365	5.00
01/01/2008	31/12/2008	100.00	5.50%	366	366	5.50
01/01/2009	31/03/2009	100.00	5.50%	90	365	1.36

01/04/2009	31/12/2009	100.00	4.00%	275	365	3.01
01/01/2010	30/11/2010	100.00	4.00%	333	365	3.65
Total Interest (1 <sup>st</sup> P. - D.1)						<b>94.06</b>

Table 6 - (1<sup>st</sup> Period - Damage 2)

From	To	Amount	Interest Rate	Total Days	Days in a Year	Interest
17/09/1996	31/12/1996	100.00	9.00%	106	366	2.61
01/01/1997	31/12/1997	100.00	7.50%	365	365	7.50
01/01/1998	31/12/1998	100.00	5.50%	365	365	5.50
01/01/1999	31/12/1999	100.00	4.25%	365	365	4.25
01/01/2000	31/12/2000	100.00	4.25%	366	366	4.25
01/01/2001	31/12/2001	100.00	5.50%	365	365	5.50
01/01/2002	31/12/2002	100.00	4.25%	365	365	4.25
01/01/2003	31/12/2003	100.00	4.25%	365	365	4.25
01/01/2004	31/12/2004	100.00	3.75%	366	366	3.75
01/01/2005	31/12/2005	100.00	4.00%	365	365	4.00
01/01/2006	31/12/2006	100.00	4.00%	365	365	4.00
01/01/2007	31/12/2007	100.00	5.00%	365	365	5.00
01/01/2008	31/12/2008	100.00	5.50%	366	366	5.50
01/01/2009	31/03/2009	100.00	5.50%	90	365	1.36
01/04/2009	31/12/2009	100.00	4.00%	275	365	3.01
01/01/2010	30/11/2010	100.00	4.00%	333	365	3.65
Total Interest (1 <sup>st</sup> P. - D.2)						<b>68.38</b>

Table 7 (1<sup>st</sup> Period - Damage 3)

From	To	Amount	Interest Rate	Total Days	Days in a Year	Interest
22/02/2006	31/12/2006	100.00	4.00%	313	365	3.43
01/01/2007	31/12/2007	100.00	5.00%	365	365	5.00
01/01/2008	31/12/2008	100.00	5.50%	366	366	5.50
01/01/2009	31/03/2009	100.00	5.50%	90	365	1.36
01/04/2009	31/12/2009	100.00	4.00%	275	365	3.01
01/01/2010	30/11/2010	100.00	4.00%	333	365	3.65
Total Interest (1 <sup>st</sup> P. - D.3)						<b>21.95</b>

Table 8 (1<sup>st</sup> Period - Damage 4)

From	To	Amount	Interest Rate	Total Days	Days in a Year	Interest
12/08/2008	31/12/2008	100.00	5.50%	142	366	2.13
01/01/2009	31/03/2009	100.00	5.50%	90	365	1.36
01/04/2009	31/12/2009	100.00	4.00%	275	365	3.01
01/01/2010	30/11/2010	100.00	4.00%	333	365	3.65
Total Interest (1 <sup>st</sup> P. - D.4)						<b>10.15</b>

**Table 9 (1<sup>st</sup> Period - Total Damage)**

	From	To	Amount	Interest	Total Sum
Damage 1	15/11/1993	30/11/2010	100.00	94.06	194.06
Damage 2	17/09/1996	30/11/2010	100.00	68.38	168.38
Damage 3	02/02/2006	30/11/2010	100.00	21.95	121.95
Damage 4	12/08/2008	30/11/2010	100.00	10.15	110.15
			<b>400.00</b>	<b>194.53</b>	<b>594.53</b>

**Table 10 (2<sup>nd</sup> Period - from claim to judgement)**

From	To	Amount	Interest Rate	Total Days	Days in a Year	Interest
30/11/2010	31/12/2010	594.53	4.00%	32	365	2.08
01/01/2011	31/12/2011	594.53	4.00%	365	365	23.78
01/01/2012	31/12/2012	594.53	4.00%	366	366	23.78
01/01/2013	26/11/2013	594.58	4.00%	329	365	21.44
Total Interest (2 <sup>nd</sup> P.)						<b>71.08</b>

**Table 11 (3<sup>rd</sup> Period - from judgement to payment)**

From	To	Amount	Interest Rate	Total Days	Days in a Year	Interest
27/11/2013	31/12/2013	594.53	6.00%	35	365	3.42
01/01/2014	12/02/2014	594.53	6.00%	42	365	4.10
Total Interest (3 <sup>rd</sup> P.)						<b>7.53</b>

**Table 12 - Total Sum Due**

1 <sup>st</sup> Period	2 <sup>nd</sup> Period	3 <sup>rd</sup> Period	Total Amount
594.53	71.08	7.53	<b>673.14</b>

(ES.40) According to the results, the claimant must seek 594.53, plus interest from the date of the claim (30.11.2010) until the date of the judgement (26.11.2013). Thus, a delay interest of 71.08 must be added. Then, due to the delay in the payment, the procedural delay interest starts to accrue from the date of the judgement (27.11.2013) until the date the debt is totally covered (12.12.2014). Thus, a procedural delay interest 7.53 must be added. Consequently, all three defendants are jointly liable for 673.14.

### Section III. Procedural Aspects

#### 3.1. What are the procedures for the party seeking to receive interest on the damages paid? (e.g. does the claimant have to make a separate plea for the interest payments and if so, what information and evidence must be supplied? Does the judge award interest *ex officio* or does the claimant have to request it?).

- (ES.41) Concerning the first period of time (i), interest must be already calculated in order to update the *quantum*.<sup>672</sup> Thus, the claim shall reflect the total amount and it must seek explicitly the legal interest from the date of the claim (second period of time (ii)).
- (ES.42) With regard to the second period of time (ii), the judge will grant interest if it has been sought in the claim. After the judgement awarding a concrete amount plus interest, either the debtor pays voluntarily, or the creditor brings what is called an ‘execution claim’.
- (ES.43) As this kind of judgement awarding an amount plus interest still to be calculated is already considered as a ‘liquid decision’<sup>673</sup> - because of the ease to calculate the interest -, there is no special procedure to request the payment.
- (ES.44) If the debtor pays voluntarily, he should make a judicial deposit consisting of the amount plus interest, which will be calculated by himself. He will calculate the interest in the terms stated in the judgement - i.e. if the judgement states that interest should be calculated from the date of the claim, then the debtor should proceed accordingly.
- (ES.45) If not, the creditor shall bring an execution claim making a breakdown of the amount requested. It should be explicitly indicated which is the principal amount (including the interest for the first period (i)) and which sum is the interest for the second period (ii). In addition, the creditor can request a provision for the future interest and court costs until the total payment. This provision cannot exceed the 30% of the total sum sought (for first (i) and second period (ii)).<sup>674</sup>

#### 3.2. Can the judge award a higher interest amount than requested by the claimant or does the principle of *ne ultra petita* apply?

- (ES.46) The principle of *ne ultra petita* applies in Spain and the judgment must be congruous with what was sought by the claimant. Thus, the judge will not award a higher amount.

#### 3.3. Can the judge estimate interest or does interest always have to be calculated?

- (ES.47) See question 3.1.

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<sup>672</sup> See Art. 253(1), first paragraph, of the the Civil Procedural Act 1/2000, which reads as follows: “*Claimant will set and justify on his writing the amount of the claim. Such amount will be calculated, in all case, according to the previous rules*”.

<sup>673</sup> Order of the Appeal Court of Jaen No. 53/2010 of 27 May 2010. Here, the court used the notion of “liquid decision” (“*sentencia liquida*” in Spanish) as equivalent to the notion of “liquid money” or “liquid asset”. The idea is that even if interest is not explicitly calculated in the judgement - only the principal amount is clearly stated -, it can be easily calculated by the parties without any special formula.

<sup>674</sup> See Art. 575(1) of the Civil Procedural Act 1/2000.

**3.4. If the claimant changes the request regarding the interest, is this regarded as an amendment of the pleadings? Is this only possible until a certain stage into the proceedings and precluded later on or can the claimant make such changes without negative procedural consequences at any time up to the judgment?**

(ES.48) The opportune stage is the date of the claim. As mentioned, the *quantum* must be already set in the claim and all the future civil proceedings relating to the same case will depend on it.

(ES.49) Actually, often the claimant forgets to seek interest for the second period (ii),<sup>675</sup> and there is no possibility to change it after the claim has been filed.

(ES.50) If it is impossible to set the exact amount claimed, the claimant must state if the *quantum* will be more or less than 6.000€ If the amount exceeds 6.000€, an ordinary civil procedure will follow. If not, the judge will conduct the case following the verbal procedure, which is shorter than the ordinary one.<sup>676</sup>

**Section IV. Specific Instances**

**4.1. Identify any cases relating to damages claims for infringements of competition law and explain how interest was calculated. In writing these summaries, provide all relevant information about how interest and other compensation for the effluxion of time was calculated.**

(ES.51) As said in the preliminary matters, there are few cases about damages claims for cartels. Most cases are about nullity of a long-term agreement, as in the Spanish service station cases.

(ES.52) In order to show what is the case-law situation in Spain, three groups of cases have been prepared. The first group contains four cartel cases. The second group is about damages claims in cases of abuse of dominant position. Lastly, the third group contains station services matters.

**Group 1**

**1.1. Barcelona Press Suppliers Cartel**

**Facts:** Several press suppliers (Ediciones Deportivas Catalanas SA, Gelesa SA, Diario El País SA and Ediciones Primera Plana SA) denied to supply daily press to one small newsstand (Catbelar SL). Catbelar had grounds to believe that there was a concerted practice.

**Amount sought:** not indicated, plus interests, plus court costs

**Court:** Court of First Instance of Barcelona (No. 46)

**Date:** 04/02/2003

**Decision:** 24,275€ plus court costs

**Court:** Court of Appeal of Barcelona (15<sup>th</sup> Section) (No. 203/2005)

**Date:** 03/05/2005

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<sup>675</sup> See the cases commented in question 4.1, as the Spanish insurance property cartel, *Céntrica Energía SLU v. Endesa Distribución Eléctrica SL* or *Estación Servicio Fontanet SL v. Repsol SA*, where the claimant did not seek for interest from the date of the claim.

<sup>676</sup> See Art. 253(2) of the Civil Procedural Act 1/2000.

**Decision:** interests recognized

**Brief comment:** The court of appeal awarded interest from the date of the claim (ii). It stated that otherwise it would have been a case of unjust enrichment. Nevertheless, there are no details whether the first amount requested by the claimant was updated.

**1.2. *Sugar Cartel (I)***

**Facts:** Price fixing cartel between several sugar producers from February 1995 until September 1996.<sup>677</sup> Sugar buyers Galletas Gullón SA, Mazapanes Donaire SL, Nestlé España SA, Zahor SA, Galletas Coral SA, Productos Alimenticios La Bella Easo SA, Lacasa SAU, Chocolates del Norte SA and Bombonera Vallisoletana SA decided to sue Acor Sociedad Cooperativa General Agropecuaria (one of the cartelists producers) for damages.

**Amount sought:** 1,101,053.13€ (damages already updated according to the legal interest), plus legal interest from the date of the claim (20.04.07), plus court costs

**Court:** Court of First Instance of Valladolid (No. 11)

**Date:** 20/02/2009

**Decision:** rejected

**Court:** Court of Appeal of Valladolid (3<sup>rd</sup> Section) (No. 261/2009)

**Date:** 09/10/2009

**Decision:** 100% granted, plus interests, no appeal costs

**Court:** Supreme Court (No. 344/2012)

**Date:** 08/06/2012

**Decision:** 100% granted, plus interests, plus cassation costs

**Brief comment:** In the initial writ, the claimants asked for a principal sum where interest for period (i) was already added –their economic report applied the legal interest from the date when the harm was caused (February 1995) until the date of the claim. They also asked for interest for period (ii). Before this argument, the defendant argued that this supposed a compound interest, so it could not be granted. However, the Supreme Court did not follow the defendant's argument, and stated that the interest for period (i) was not an interest itself, but an interest in order to compensate currency depreciation. Thus, this was not considered as compound interest by the court, but a method of updating the claim and the interest for period (ii) was also granted.

**1.3. *Sugar Cartel (II)***

**Facts:** The same price fixing cartel as in *Sugar Cartel (I)*. Nestlé España SA, Productos del Café SA, Helados y Postres SA, Chocolates Hosta Dulcinea SA, Zahor SA, Mazapanes Donaire SL, LU Biscuit SA, Chocolates Torras SA, Arluy SL, Chocovic SA, La Casa SAU, Productos Mauri SA, Delaviuda Alimentación SA and Wrigley Co SA, against another cartelists producer, Ebro Puleva SA.

**Amount sought:** 4,105,212.57€ (updated according to the legal interest), plus legal interest from the date of the claim (20.04.07), plus court costs

**Court:** Court of First Instance of Madrid (No. 50) (No. 59/2010)

**Date:** 01/03/2010

**Decision:** 50% granted, plus interests, no court costs

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<sup>677</sup> Decision of the Spanish Competition Authority of 15 April 1999, Case No. 426/98.

**Court:** Court of Appeal of Madrid (8<sup>th</sup> Section) (No. 370/2011)

**Date:** 03/10/2011

**Decision:** 100% granted, plus interests, no appeal costs

**Court:** Supreme Court (No. 651/2013)

**Date:** 07/11/2013

**Decision:** 100% granted, plus interest, plus first instance and appeal costs

**Brief comment:** The claimants calculated according to the overcharge paid to the defendant. Then, that amount was updated according to the legal interest. Additionally, the Supreme Court granted interest from the date of the claim.

#### 1.4. *Spanish Property Insurance Cartel*

**Facts:** Price fixing cartel by three insurance companies (Asefa SA, Scor Global SE and Caser SA) on property insurance premiums.<sup>678</sup> Musaat (another insurance company) sued all the three cartelists for suffering from 2007 boycott actions due the commercialization of insurances under the price fixed by the cartel. The claim was filed on 19/01/2012.

**Amount sought:** 3,732,123€(*damnum emergens*), plus 19,592,241€(*lucrum cessans*), plus court costs

**Court:** Court of First Instance of Madrid (No. 12) (No. 88/2014)

**Date:** 09/05/2014

**Decision:** 3,550,615.70€(*damnum emergens*)

**Brief comment:** The case offers some important points to be underlined. Firstly, the court stated that the claimant did not demonstrate the *lucrum cessans*. Secondly, the claimant did not expressly demand the legal interest from the date of the claim, thus the court did not award it. Thirdly, the first amount sought as *damnum emergens* was reduced to 3,082,688€ Fourthly, the economic report took into consideration the average rate of the State Treasury bonds for five years instead of the legal interest rate. The average rate was 4.16% on 2007, 4.09% on 2008, 2.97% on 2009 and 3.17% on 2010. Thus, the court set the amount at 3,550,615.70€<sup>679</sup>

### Group 2

#### 2.1. *Football Broadcast*

**Antena 3 Televisión SA v. Liga Nacional de Fútbol Profesional (LNFP)**

**Facts:** The defendant (LNFP) impeded several broadcasts companies from accessing to football images and advertising incomes. Antena 3 sought for damages. The claim was filed on 30/12/2004.

**Amount sought:** 34,000,000€ plus legal interest from the date of the claim, plus procedural delay costs, plus court costs

**Court:** Court of First Instance of Madrid (No. 4) (No. 125/2005)<sup>680</sup>

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<sup>678</sup> Decision of the Spanish Competition Authority of 12 November 2009, Case No. S/0037/08.

<sup>679</sup> Actually, the amount should be 3,526,286.79€ instead of 3,550,615.70€ (i.e. €24,328.79 less). It is possible that there is a minor error in the transcription of the judgement in the private case-law database, or perhaps an arithmetic error in the calculations of the same judgement.

<sup>680</sup> The First Instance decision was finally rejected by both the Court of Appeal of Madrid (Judgement of the 8<sup>th</sup> Section of 18 December 2006) and the Supreme Court (Order of 14 April 2009) for reasons other than interest calculation.

**Date:** 07/06/2005

**Decision:** 25,500,000€ plus interest from 30/12/2004 (date of the claim) to 07/06/2005 (date of the judgement), plus procedural delay costs (C)

**Brief comment:** It is not mentioned if the amount sought was updated according to the legal interest. The court of first instance awarded legal interest from the date of the claim (B) and, if applicable, procedural delay interest (C).

## **2.2.      *Football Broadcast***

### ***Cableuropa SAU v. Sogecable SA and Audiovisual Sport SL***

**Facts:** The two defendants had exclusive rights to broadcast the Spanish football league. The claimant sued Sogecable (parent company) and Audiovisual Sports (affiliated company) because they did not apply a progressive discount to other operators as they were obliged in order to keep the exclusivity. The claim was filed on January 2008.

**Amount sought:** 4,790,913€ (for the season 2003/2004), plus 5,793,798€ (for the season 2004/2005), plus 8,659,859€ (for the season 2005/2006), plus an amount resulting from an arithmetical calculation for the seasons 2006/2007, 2007/2008 and 2008/2009, plus interest for each season, plus court costs

**Court:** Commercial Court of Madrid (No. 7)

**Date:** 04/03/2010

**Decision:** season 2003/2004: 4,790,913€ plus interest of 390,544€ = 5,181,457€, season 2004/2005: 5,793,798€ plus interest of 472,297€ = 6,266,095€, season 2005/2006: 8,659,859€ plus interest of 705,931€ = 9,365,790€, season 2006/2007: 9,007,374€, season 2007/2008 and 2008/2009: to be calculated in an ulterior execution procedure.

**Brief comment:** The case offers some important points to be underlined. Firstly, the damages have been calculated in the economic report according to the overcharge paid. Secondly, interest for the first period (i) was not calculated but for the second period (ii) until 15 July 2009. There is no explanation why it was calculated until 15 July 2009, unless it was the end of the season 2008/2009. Thirdly, for the amount related to the season 2006/2007, there is no explicit mention to interests. Fourthly, the court stated that legal interest had to be applied because it was a delay interest (B). Fifthly, the court also granted the procedural delay interest (C). This sounds strange as this is a first instance judgement, and the procedural delay interest is calculated within an ulterior execution procedure if the debtor does not pay the amount granted by the court.

## **2.3.      *Electra Caldense SA v. Endesa Distribución Eléctrica SL***

**Facts:** The Spanish Competition Authority imposed a fine to Endesa because of abuse of dominant position. Electra Caldense sued Endesa seeking nullity of their agreement and damages.

**Amount sought:** nullity of the agreement, plus 3,492,919.29€

**Court:** Commercial Court of Barcelona (No. 7)

**Date:** 03/11/2010

**Decision:** claim rejected

**Brief comment:** There is no mention of interest in the economic report submitted by the claimant. He did not request interest from the date of the claim, thus the court did not grant it.



#### 2.4. *Céntrica Energía SLU v. Endesa Distribución Eléctrica SL*

**Facts:** The monopolist electricity distributor (Endesa) must provide electricity to the other commercial electricity suppliers with information about supplying points connected to its network. The claimant Céntrica sued Endesa because of its refusal to provide such information. The Spanish Competition Authority considered this an abuse of dominant position.<sup>681</sup>

**Amount sought:** 33,308.33€ (*damnum emergens*), plus 5,232,175€ (*lucrum cessans*), plus procedural delay interest (C), plus court costs

**Court:** Commercial Court of Barcelona (No. 2)

**Date:** 20/01/2011

**Decision:** 673,699.10€ (*damnum emergens* plus *lucrum cessans*) for damages on low-power market, plus an amount to be calculated afterwards for damages on high-power market, plus interest from the judgement date (C)

**Court:** Court of Appeal of Barcelona (15<sup>th</sup> Section) (No. 153/2012)

**Date:** 19/04/2012

**Decision:** amount increased and rest of the first instance judgement confirmed

**Court:** Supreme Court (No. 260/2014)

**Date:** 04/06/2014

**Decision:** the appeal judgement confirmed, plus cassation costs

**Brief comment:** The *quantum* sought by the claimant was updated in the economic report according to the monthly consumer price index, instead of the legal interest rate. Nevertheless, the court mentioned that there were some interest updates that were not sought by the claimant. In addition, the claimant did not seek interest from the date of the claim (B) - this is why it was not granted - but procedural delay interest (C). This was unnecessary as the procedural delay interest is granted *ex officio*.

### Group 3

#### 3.1. *Service Station*

##### **Estación Servicio Fontanet SL. v. Repsol SA**

**Facts:** The claimant Fontanet sought the nullity of two long-term agreements with Repsol, the reimbursement of an amount, damage and loss of profits.

**Amount sought:** nullity of both agreements, plus 43,410€ (reimbursement) and its corresponding interest, plus 891,067.83€ (damage and loss of profits)

**Court:** Commercial Court of Palma

**Date:** 03/03/2009

**Decision:** nullity, plus 43,410€ plus 218,958.98€ plus procedural delay interest (C)

**Court:** Court of Appeal of Balearic Islands

**Date:** 01/09/2010

**Decision:** first judgment confirmed

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<sup>681</sup> Decision of the Spanish Competition Authority of 2 April 2009.

**Court:** Supreme Court (No. 272/2013)

**Date:** 08/05/2013

**Decision:** appeal judgement confirmed

**Brief comment:** The calculation of the amounts requested by the claimant included an update according to the consumer index price. Interest from the date of the claim was not granted as the court considered that the claimant did not seek it specifically, even if the sentence '*its corresponding interest*' was present in the claim.

### 3.2. *Service Station*

#### *Sociedad Expendedora de Gasolinas y Aceites SA v. Repsol SA*

**Facts:** The claimant sued Repsol seeking for nullity of the long-term supplying agreement of fuel. In the claimant's opinion, the agreement was anti-competitive because of indirect resell price fixing.

**Amount sought:** nullity of the agreement, plus an amount regarding the surcharge paid to the supplier (Repsol) between 14/01/1993 and 17/08/2008, plus interest, plus court costs

**Court:** Commercial Court of Madrid (No. 3)

**Date:** 19/06/2013

**Decision:** only nullity

**Brief comment:** Despite the fact that the court did not award any amount, it is interesting as it mentioned the case *Manfredi*, stating that the *lucrum cessans* should have been calculated considering the damage resulting from being obliged to sell at a higher price and therefore lose customers, plus interest.

### 3.3. *Service Station*

#### *Estació de Servei Cornellà S.L, v. Cepsa SA*

**Facts:** The claimant sued Cepsa seeking for nullity of the long-term supplying agreement of fuel. In its opinion, the agreement was anti-competitive because of direct and indirect resell price fixing.

**Amount sought:** nullity of the agreement, plus an amount still to be calculated (*damnum emergens*), plus interest, plus court costs

**Court:** Commercial Court of Madrid (No. 3) (No. 40/2014)

**Date:** 25/02/2014

**Decision:** nullity, plus 97,444.78€(*damnum emergens*), plus interest from 2013

**Brief comment:** The court did not award any amount as *lucrum cessans* since it was not sought explicitly. The *damnum emergens* was caused in 2012, thus it calculated the legal interest from 01/01/2013 until the date of the judgement. The court mentioned the draft of the Directive 2014/104/EU and stated that interest should have been calculated from the moment the harm was caused. Here, since no concrete amount was sought in the claim but only a formula because of the difficulties to state the exact amount of the claim, the court calculated interest according to the new Directive. Thereby, interest starts to accrue as from the date of the harm but in order to be granted, it must be claimed.

**4.2. Are the rules on the award of interest specific to the kinds of claim or general principles? Are there any specific approaches/rules that you can identify in national or EU competition cases, or in other cases where the claim is brought by business against business (B2B) and are there any specific approaches/rules in business versus consumer (B2C) cases?**

(ES.53) The Spanish legal system does not make any difference between B2B and C2B cases.

(ES.54) Nevertheless, it should be taken into account that in case of collective actions relating to consumers, only consumers' associations are entitled to initiate proceedings.<sup>682</sup>

***Section V. Evaluation, Interpretation in conformity with EU Law, and Intertemporal Aspect***

**5.1. Throughout the reports, evaluate how satisfactory are the rules on the calculation of interest perceived to be? In considering this question, identify any law reform proposals in the last 15 years or so, or any major judgments by the higher courts that call into question or change some of the issues pertaining to the award of damages. Please identify changes of relevant national law on interest that will come into force or are currently considered.**

(ES.55) Traditionally, in Spanish tort law, it can be stated that the right to full compensation is achieved quite satisfactorily. The claimant can demand an amount including damages and loss of profits updated according to the legal interest (first period of time (i) plus interest from the date of the claim until the date of the judgement (second period of time (ii)). Generally speaking, the Spanish interest regime thus ensures that the claimant is not overcompensated and that the cartelists are disgorged of their illegal profits.

(ES.56) Concerning future changes, it should be noted that the new General Budget Annual Act for 2016 establishes the legal interest rate at 3.00% (see Table 1 in question 2.5).

**5.2. For each question, where it is relevant, assess the compliance of the national interest rules with the minimum standard prescribed by EU law ('full compensation'). If national law does not grant full compensation, please try to identify an interpretation of national law that guarantees full compensation in conformity with European law.**

(ES.57) Spanish courts normally award interest from the date the claim was brought until the date of the judgement if it has been sought. Then, procedural delay interest is applied until the debt is fully covered.

(ES.58) It can be stated that the weakest point is that it depends on the actions of the claimant. If the claimant does not update the amount sought or does not request interest from the date of the claim, the court will not grant it.

(ES.59) Nevertheless, it should be noticed that more often courts are recognizing the importance of granting interest for losses resulting from infringements of competition law from the date the harm occurred (see the service station case *Estació de Servei Cornellà SL v. Cepsa SA* in question 4.1).

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<sup>682</sup> See Art. 11 of the Civil Procedural Act 1/2000.

- 5.3. Finally, when assessing the overall compliance of national law with the principle of full compensation based on directly applicable EU law, please confirm that national courts have to apply it also in relation to past infringements of EU competition law or the equivalent provisions of the EEA agreement (e.g. cartels starting in the 1990ies and ending in the 2000er years).**

(ES.60) National courts invoke Art. 101 and 102 of the TFEU and national law with no distinction; and they are awarding interest in relation to past infringements whether it is EU competition law or national law. The Spanish sugar cartel is an example as it began on February 1995 (see question 4.1).

- 5.4. Regarding the secondary subject of investigation (interest on damages due to infringements of national competition law only) Recital 12 of the preamble of Directive 2014/104/EU summarises the EU law principles regarding interest as follows:**

*“Anyone who has suffered harm caused by an infringement can claim compensation for the actual loss (damnum emergens), for the gain of which he has been deprived (loss of profit or lucrum cessans) plus interest. This is irrespective of whether the national rules define these categories separately or in combination. The payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time, and it should be due from the time the harm occurred until compensation is paid, without prejudice to the qualification of such interest as compensatory or default interest under national law. This is also without prejudice to whether effluxion of time is taken into account as a separate category (interest) or as a constituent part of actual loss of profit. It is incumbent on the Member States to lay down the rules to be applied for that purpose”.*

**Would the right to full compensation as set out by Recital 12 of the proposed directive apply to interest calculation for damages in cases where only national competition law has been infringed and the damage occurred before the implementation of the directive came into force?**

(ES.61) Yes, it would apply. As mentioned, neither the Spanish law nor the case-law differentiate between the breach of EU or national competition law.



## Sweden

Magnus Strand\*

### *Part 1. General principles*

#### **1. What is interest? Is there a definition?**

- (SE.1) The Swedish Interest Act does not define interest as such but sets out rules and rates of general application within commercial private law. The Interest Act is, in principle, subsidiary in character and yields to special statutory provisions and to contractual agreements on interest.<sup>683</sup> However, the Interest Act includes certain mandatory rules, eg on adjustment in the event of “social force majeure” (eg illness, unemployment and the like).<sup>684</sup>
- (SE.2) Within the scope of application of the Interest Act, courts are not at liberty to deviate from its rules and rates without basis in special statutory provisions, an agreement or at least a promise by a party. Outside the scope of application of the Interest Act, courts are at liberty to apply its rules and rates by analogy.<sup>685</sup>

#### **2. When, and under what conditions, is interest payable at all? Does this depend on whether the claim is brought in tort, breach of contract or (where applicable) restitution/unjust enrichment?**

- (SE.3) The Interest Act focuses on interest on overdue payments, but covers also interest in the event of restitution of payments pursuant to the annulment of a contract,<sup>686</sup> and interest on contractual and non-contractual damages and “similar amounts that are not possible to determine without particular examination” (eg insurance awards).<sup>687</sup>
- (SE.4) Restitutionary awards other than the *condictio indebiti* are not common in Swedish law. As mentioned, restitution of payments pursuant to the annulment of a contract is explicitly addressed in the Interest Act. In non-contractual restitution, it is not quite clear whether the award of interest should be governed by that rule or by the rule concerning damages and “similar amounts that are not possible to determine without particular examination”. In practice, however, the distinction is less important, for reasons explained under question 7.

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<sup>683</sup> Swedish Interest Act (*Räntelag* 1975:635), s 1.

<sup>684</sup> Swedish Interest Act, s 8. A number of mandatory rules were recently introduced in order to implement Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions [2011] OJ L48/1.

<sup>685</sup> Gösta Walin & Johnny Herre, *Lagen om skuldebrev m.m.: En kommentar* (3rd edn, Norstedts Juridik 2011) 276.

<sup>686</sup> Swedish Interest Act, s 2 ss 2.

<sup>687</sup> Swedish Interest Act, s 4 ss 3.

**3. Is payment of interest compulsory or at the discretion of the court?**

(SE.5) It is for the claimant to claim interest. In principle, the issue of interest and its rate is at the disposal of the litigating parties.<sup>688</sup> In the event that the defendant disputes the claim for interest and/or the rate claimed, the court will need to rule on those issues. The point of departure for the court will be the rules and rates in the Interest Act, albeit within the limits set by the views taken by the parties.

**4. What is said to be the purpose of the interest payment?**

(SE.6) No legally authoritative statements on the purpose of interest awards have been found.

**5. What is the legal basis for the payment of interest (statutes, contractual agreements, case law, soft law guidance)?**

(SE.7) The Swedish Interest Act (Räntelag 1975:635) sets out rules and rates of general application within commercial private law. The Interest Act is, in principle, subsidiary in character and yields to special statutory provisions and to contractual agreements on interest.<sup>689</sup> However, the Interest Act includes certain mandatory rules, eg on adjustment in the event of “social force majeure” (eg illness, unemployment and the like).<sup>690</sup>

(SE.8) The demarcation lines between situations addressed in the Interest Act are for the courts to outline in case law.

**6. What are the procedures for the party seeking to receive interest on the damages paid? (For example, does the claimant have to make a separate plea for the interest payments and if so, what information and evidence must be supplied?)**

(SE.9) It is for the claimant to claim interest. In principle, the issue of interest and its rate is at the disposal of the litigating parties.<sup>691</sup> In the event that the defendant disputes the claim for interest and/or the rate claimed, the court will need to rule on those issues. The point of departure for the court will be the rules and rates in the Interest Act, albeit within the limits set by the views taken by the parties.

(SE.10) In the event of dispute with regard to the payment of interest and/or its rate, the parties will likely disagree on either (1) the applicability of the Interest Act, or (2) the proper character of the main claim (eg whether it is for restitution of a payment pursuant to the annulment of a contract or for contractual damages). The calculation of interest might plausibly also be at dispute in respect of the relevant time period for which interest is payable (eg from which date interest is payable). It is for the litigating parties to present relevant arguments and evidence to support their claims on these issues.

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<sup>688</sup> This follows from the subsidiary character of the Interest Act.

<sup>689</sup> Swedish Interest Act, s 1.

<sup>690</sup> *ibid* s 8. A number of mandatory rules were recently introduced in order to implement Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions [2011] OJ L48/1.

<sup>691</sup> This follows from the subsidiary character of the Interest Act.

## Part II Calculation of interest

### 7. What is the rate of interest that is set? How is it arrived at? Are there statutes?

- (SE.11) The Interest Act entered into force on 1 January 1976 and has regulated the award of interest on damages since then, with the exception of situations where interest has accrued from a date preceding 1 January 1976.<sup>692</sup>
- (SE.12) The statutory rate of interest on damages is the interest for delay. Interest for delay is set as the so-called reference rate set twice a year (1 January and 1 July) by the Swedish Central Bank (*Riksbanken*), plus 8 per cent.<sup>693</sup> The applicable rate follows the variations of the reference rate over time, and accordingly the amount of interest payable with regard to a certain damages claim may need to be calculated separately for each half-year until payment.
- (SE.13) By contrast, which may be of interest in this context, the statutory rate of interest on restitution of payments pursuant to the annulment of a contract is the so-called interest on earnings, which is set as the reference rate plus 2 per cent.<sup>694</sup> Accordingly, the claimant may wish to construe the claim so as to enjoy the higher rate applicable to damages. However, it suffices in order to enjoy the higher rate to dispatch to the defendant a notice presenting a specified claim for restitution to be paid at a certain date, stating that interest will accrue unless payment is made on time. In the event of non-payment, the higher rate will begin to apply from the 30th day from the dispatch of the notice. For time lapsed from the *solutio indebiti* up until that day, the lower rate applies.<sup>695</sup>

### 8. Is interest simple or compound? If the interest is neither simple nor compound as defined above, please elaborate.

- (SE.14) The Interest Act provides for two different rates, explained under question 7. Other rates can be agreed upon by contracting parties, albeit within the limits of reasonability.<sup>696</sup> None of these rates are calculated on compound basis, but only on simple basis. Under Swedish law, compound interest will be available only if agreed upon.<sup>697</sup> It is even uncertain in Swedish law whether interest is payable on amounts of interest on debts, where the main debt has not matured but eg an annual amount of interest has.<sup>698</sup>
- (SE.15) The higher rate referred to in question 7 applies generally to belated payments but also to contractual and non-contractual damages and “similar amounts that are not possible to determine without particular examination” (eg insurance awards).<sup>699</sup>

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<sup>692</sup> Swedish Interest Act, rule on its coming into effect.

<sup>693</sup> Swedish Interest Act, s 6. Before 1 July 2002, the reference rate was known as the discount rate (*diskonto*).

<sup>694</sup> Swedish Interest Act, s 5.

<sup>695</sup> See Swedish Supreme Court judgment NJA 2008 s 392, 404-405.

<sup>696</sup> Limitations of that kind follow from the Swedish Contracts Act (*Lag (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område*), chapter 3.

<sup>697</sup> See NJA 1994 s 3 (Swedish Supreme Court); and Stefan Lindskog, *Betalning* (Norstedts Juridik 2014) 510-520 (in particular 517).

<sup>698</sup> Walin & Herre, 295-296; equally uncertain on this specific issue are Mikael Mellqvist & Ingemar Persson, *Fordran & Skuld* (9th edn, Iustus 2011). Authors however agree that statutory interest cannot be calculated on compound basis in Swedish law.

<sup>699</sup> Swedish Interest Act, s 4 ss 3.



(SE.16) The lower interest rate referred to in question 7 is particular to restitution of payments pursuant to the annulment of a contract, but applies quite generally in similar situations. It is therefore of no consequence to the applicability of the rule whether nullity applies *ex tunc* or *ex nunc*<sup>700</sup> or whether the contract was annulled pursuant to a breach of contract by the claimant or by the defendant. It has been submitted that it also applies to a *condictio indebiti* where the recipient received money in good faith.<sup>701</sup>

**9. What is the time for which interest is calculated? When does interest start to accrue, when does the accrual of interest end? Are there any situations where the action of the plaintiff, for example delay on his part, serves to change the time for which interest is calculated? Are there provisions for suspension of the accrual of interest?**

(SE.17) Interest on damages claims starts to accrue the 30th day following the presentation, by the claimant, of the claim for damages and the investigation that can reasonably be required by the claimant under the circumstances. However, interest will not start to accrue until the presentation of the claim and investigation has been provided to the defendant.<sup>702</sup>

(SE.18) Interest will alternatively start to accrue on the date of service of an application for a payment order with the Swedish Enforcement Authority (*Kronofogdemyndigheten*), or service of summons to court.<sup>703</sup>

(SE.19) By way of exception, interest starts to accrue from the day on which harm was incurred if the cause for harm was an intentional crime.<sup>704</sup> However, a breach of EU or national competition law is not sanctioned as a criminal offence in Swedish law.

(SE.20) Interest ceases to accrue when payment of the claim is made. The Interest Act includes no rules on suspension of the accrual of interest.

(SE.21) With regard to the significance of the behaviour of the claimant, it can be repeated that it is for the claimant to claim interest and to specify the rate of interest to be applied. In principle, the issue of interest and its rate is at the disposal of the litigating parties.<sup>705</sup> In the event that the defendant disputes the claim for interest and/or the rate claimed, the court will need to rule on those issues. The point of departure for the court will be the rules and rates in the Interest Act, albeit within the limits set by the views taken by the parties.

(SE.22) As customers of clandestine cartels do not know that they are suffering damages, requiring a prior notice, payment order or service of summons in order for interest to accrue might be contrary to EU law requirements. The resulting uncertainty is discussed at the end of the report at question 23 and has caused trifurcation in the calculations for the hypothetical at question 15.

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<sup>700</sup> Of course, this distinction will be relevant to the determination of the point in time from which interest accrues.

<sup>701</sup> Walin & Herre, 281.

<sup>702</sup> Swedish Interest Act, s 4 ss 3.

<sup>703</sup> Swedish Interest Act, s 4 ss 4.

<sup>704</sup> Swedish Interest Act, s 4 ss 5.

<sup>705</sup> This follows from the subsidiary character of the Interest Act.

**10. Are there any specific provisions if payment is requested in a different currency than that in the state where the lawsuit is brought? (e.g. a Swedish company claims for damages resulting from an EU-wide cartel against a German cartel member in Germany. Can the court award only EUR or also Swedish Krona?**

(SE.23) Claimants are at liberty to request payment in other currencies than SEK. There do not seem to be any specific rules on the issue of the currency chosen in the claim.

**11. As damage claims for infringements of EU competition rules often pertain to long-running infringements, please include all applicable interest rates and the date the rate came into force from 1 January 1985 until today. Unless impossible due to national peculiarities, the rates should be listed in a two column table, containing the rate and the date it came into force. This should be accompanied by a legal retrospective that sets out any other changes to the relevant interest regime (e.g. the time interest starts to run etc.) which occurred over this period, in order to allow a determination of which rules applied at a given point in time between 1 January 1985 and today.**

(SE.24) The following table lists applicable interest rates under section 6 of the Swedish Interest Act. The rules of the Interest Act have, in the relevant aspects, remained intact since 1 July 1984. However, an administrative change has been made, whereby the rate of interest on damages awards was the *Riksbanken* discount rate plus 8 per cent up until 30 June 2002. As from 1 July 2002, it was instead the *Riksbanken* reference rate plus 8 per cent. This is highlighted in the table below. It is also visible in the table below that the interval of changes was at the discretion of the *Riksbanken* before this change, but that the applicable rate has since been set at 1 January and 1 July every year.

(SE.25) Unfortunately, rates from 1 January 1985 until 1988 have been found only in the form of annual mean rates.<sup>706</sup>

Year and dates of rate changes		Swedish Riksbank reference or discount rate plus 8 per cent
1985	since 29 June 1984	17.50 (discount rate plus 8)
	14 May	19.50
	12 July	18.50
1986	17 Jan	17.50
	14 Mar	16.50
	18 Apr	16.00
	19 Sept	15.50
1987	no changes	15.50
1988	29 Apr	16.50
1989	28 Apr	17.50
	8 Dec	18.50
1990	16 Mar	20.00
	18 May	19.00
	23 Nov	19.50

<sup>706</sup> The rates prior to 29 April 1985 were unavailable at <http://www.riksbanken.se>, but have been provided for the purposes of this report by the Riksbanken.

1991	1 Feb	19.00
	8 Mar	18.00
	31 May	17.00
	4 Oct	16.00
1992	17 Jan	16.50
	2 Oct	18.00
1993	5 Jan	17.00
	2 Apr	15.00
	2 July	14.00
	8 Oct	13.00
1994	4 Jan	12.50
	4 July	13.50
	4 Oct	15.00
1995	4 July	15.50
	6 Oct	15.00
1996	3 Jan	14.00
	2 Apr	13.50
	2 July	12.50
	2 Oct	11.50
1997	3 Jan	10.50
1998	2 July	10.00
1999	5 Jan	9.50
	6 Apr	9.00
	4 Oct	9.50
2000	4 Apr	10.50
	1 July	10.00
2001	3 Apr	9.50
	3 July	10.00
2002	3 Jan	9.50
	3 Apr	10.00
	1 July	12.50 (reference rate plus 8)
2003	1 Jan	12.00
	1 July	11.00
2004	1 Jan	11.00
	1 July	10.00
2005	1 Jan	10.00
	1 July	9.50
2006	1 Jan	9.50
	1 July	10.50
2007	1 Jan	11.00
	1 July	11.50
2008	1 Jan	12.00
	1 July	12.50
2009	1 Jan	10.00
	1 July	8.50

2010	1 Jan	8.50
	1 July	8.50
2011	1 Jan	9.50
	1 July	10.00
2012	1 Jan	10.00
	1 July	9.50
2013	1 Jan	9.00
	1 July	9.00
2014	1 Jan	9.00
	1 July	9.00
2015	1 Jan	8.00

**12. Please identify an official, reliable, publicly available source that publishes the pertinent legal interest rates as they change.**

(SE.26) The reference rate is published at the *Riksbanken* web site: <http://www.riksbank.se/en>. Historical reference and discount rates since 1 July 2002 are currently available in English at <http://www.riksbank.se/en/Interest-and-exchange-rates/Reference-rate-table>.

A table in Swedish including rates since 29 April 1988 is currently available at <http://www.riksbank.se/sv/Rantor-och-valutakurser/Referensranta-och-tidigare-diskonto-tabell>. As mentioned, section 6 of the Interest Act provides that the interest rate on damages awards is the reference rate plus 8 per cent.

**13. If interest rates change on a fixed schedule, please indicate the schedule.**

The reference rate is adjusted twice annually, on 1 January and 1 July.<sup>707</sup>

**14. If part of the debt / the damage is being paid, how is interest calculated following that payment? In particular: Do partial payments first cover interest or the principal amount? Is there any provision or legal practice similar to Art 86(3)(2) of the rules of application of Regulation 966/2012 on the financial rules applicable to the general budget of the Union where it is stated that ‘Any partial payments shall first cover the interest’?**

(SE.27) Interest accrues on the part of the debt which is not paid. If part of the debt is paid, interest will not continue to accrue on that part of the debt, but only on the unpaid part of the debt.

(SE.28) In principle, interest does not accrue on interest not paid. Exceptions are debated in legal writing, but not in circumstances relevant to damages awards.<sup>708</sup> According to the Swedish Trade Code of 1734, ch 9 s 5 payments first cover the accrued interest. Only when all accrued interest has been paid will payments pertain to the principal. It may be mentioned that in the aforementioned Swedish Supreme Court case NJA 1994 s 3, the creditor caused payments to be regarded as pertaining to the principal instead of the accrued interest.. However, circumstances were particular.

<sup>707</sup> Cf Swedish Interest Act, s 9.

<sup>708</sup> See Walin & Herre, 295-296. See further under question 8.

15. **Hypothetical: Please calculate interest in the following hypothetical case. All dates are given in the format dd.mm.yyyy. All amounts are stated without specifying the currency to abstract from implications of the introduction of the common Euro currency. Assume that the claims have not been time barred. Assume that a national court in the Member State on which you are reporting has jurisdiction to rule on the case. Assume that the cartelists are jointly liable for the damage caused by the cartel. If results differ materially depending on whether accrual of interest is based purely on national law or made in compliance with the EU principle of full compensation, provide both calculations.**

**There was a long running pan-European cartel for a product that materially affected trade between Member States. The cartel lasted from the beginning of 1993 until the dawn raids (unannounced inspections) of the European Commission on 02.02.2009.**

**On 30.11.2010, a longtime customer of the cartel, who bought the cartelised product in the Member State on which you are reporting, brings a claim for damages against three cartelists (A, B, and C). All of the three defendants have their seat in the Member State on which you are reporting. The customer only bought the cartelised product of the cartelists A and B. In the writ, the claimant specifies the damages caused by the cartel and the date on which the respective damage occurred. The claimant also specifically requests that interest be paid on the damages. The damages (always = 100) and respective dates are set out in table 1 below. Should a subjective rate be of relevance, you will find the ROI (Return On Investment) rates of the claimant and the three defendants in table 2. You will also find the average interest rate that the claimant had to pay on credit taken out in that year (claimant's average refinance rate).**

**On 26.11.2013 a court renders a final judgment, ordering the defendant(s) to pay damages and interest. The defendants take until 12.02.2014 to pay. Please specify the total amount the jointly liable defendants have to pay on 12.02.2014 in order to relinquish their debt towards the claimant.**

Table 3

Date the damage occurred	Damage amount
15.11.1993	100
17.09.1996	100
22.02.2006	100
12.08.2008	100

Table 4

YEAR	Claimant's refinance rate in %	Claimant's annual ROI in %	Defendant's A annual ROI in %	Defendant's B annual ROI in %	Defendant's C annual ROI in %
1993	6	5,5	4	4	3
1994	6	9,8	4	4	4
1995	6	9,5	4	4	5
1996	6	1	0	0	0
1997	8	-3,8	1	1	3
1998	8	1,1	4	4	5
1999	8	2,8	1	1	3
2000	8	1,1	-2	-1	0
2001	8	4,51	2	2	3
2002	8	5,3	4	4	5
2003	8	8,21	9	9	9
2004	7	9	3	3	2
2005	7	10	1	1	1
2006	7	6	1	1	1
2007	5	-5	4	4	2
2008	5	-7	-1	0	0
2009	5	-5	2	2	4
2010	5	-3	4	4	4
2011	5	-2,7	4	4	2
2012	5	1,61	-2	-1	0
2013	5	4,4	8	8	7
2014	5	1,41	-4	-3	-1

(SE.29) This question will be approached in three alternative ways. First, in accordance with the Swedish Interest Act. Second, using rates set by the Swedish Interest Act but presuming that the interest at the applicable rate should accrue from the occurrence of harm. Thirdly, using the interest for earnings rate from the occurrence of harm and up until the service of summons. The three alternatives are discussed under question 23.

#### **First alternative**

(SE.30) To answer this question in accordance with the rules of the Swedish Interest Act, it is necessary to specify two further assumptions. It will thus be assumed for the purposes of this question that the claim for damages and the investigation that can reasonably be required by

the claimant under the circumstances had not been presented to A, B and C prior to the service of the summons issued by the competent court.<sup>709</sup> Moreover, any time lapse between the bringing of the claim and the service of summons will be neglected, so it will be assumed that service of the summons occurred on 30 November 2010.

The total amount of harm suffered was 400 units. Based on the above assumptions, interest under the Swedish Interest Act will accrue from 30 November 2010 up until 12 February 2014.<sup>710</sup> The amounts payable are the following (rounded to full units for convenience of presentation and calculation):

30 November 2010 – 31 December 2011	Interest rate 8.50 %	Sum: 37 units
1 January 2011 – 30 June 2011	Interest rate 9.50 %	Sum: 19 units
1 July 2011 – 30 June 2012	Interest rate 10.00 %	Sum: 40 units
1 July 2012 – 31 December 2012	Interest rate 9.50 %	Sum: 19 units
1 January 2013 – 31 December 2013	Interest rate 9.00 %	Sum: 36 units
1 January 2014 – 12 February 2014	Interest rate 9.00 %	Sum: 4 units

(SE.31) The sum total of interest accrued under this alternative would be 155 units. The total amount the jointly liable defendants would have to pay on 12 February 2014 in order to relinquish their debt towards the claimant would therefore be 555 units.

### **Second alternative**

(SE.32) Assuming that EU law would require for interest to accrue from the day that damage has occurred, the four instances of damage specified in table 1 would need to be considered individually. There would thus be separate calculations for each instance of harm. The amounts of interest payable would then be summarized. Under this second alternative, calculations have been carried out using the rate applicable under the Swedish Interest Act but interest has accrued since the occurrence of harm.

### **Harm incurred 15 November 1993**

Amount of harm: 100 units.

Interest amounts payable (rounded to full units for convenience of presentation and calculation):

15 November 1993 – 3 January 1994	Interest rate 13.00 %	Sum: 2 units
4 January 1994 – 3 July 1994	Interest rate: 12.50 %	Sum: 6 units
4 July 1994 – 3 October 1994	Interest rate: 13.50 %	Sum: 3 units
4 October 1994 – 3 July 1995	Interest rate: 15.00 %	Sum: 11 units
4 July 1995 – 5 October 1995	Interest rate: 15.50 %	Sum: 4 units
6 October 1995 – 2 January 1996	Interest rate: 15.00 %	Sum: 4 units
3 January 1996 – 1 April 1996	Interest rate: 14.00 %	Sum: 3 units
2 April 1996 – 1 July 1996	Interest rate: 13.50 %	Sum: 3 units
2 July 1996 – 1 October 1996	Interest rate: 12.50 %	Sum: 3 units
2 October 1996 – 2 January 1997	Interest rate: 11.50 %	Sum: 3 units
3 January 1997 – 1 July 1998	Interest rate: 10.50 %	Sum: 16 units
2 July 1998 – 4 January 1999	Interest rate: 10.00 %	Sum: 5 units
5 January 1999 – 5 April 1999	Interest rate: 9.50 %	Sum: 2 units

<sup>709</sup> See question 9 above.

<sup>710</sup> Swedish Interest Act, s 4 ss 3-4 and s 6. See further question 9 above.

6 April 1999 – 3 October 1999	Interest rate: 9.00 %	Sum: 4 units
4 October 1999 – 3 April 2000	Interest rate: 9.50 %	Sum: 5 units
4 April 2000 – 30 June 2000	Interest rate: 10.50 %	Sum: 3 units
1 July 2000 – 2 April 2001	Interest rate: 10.00 %	Sum: 8 units
3 April 2001 – 2 July 2001	Interest rate: 9.50 %	Sum: 2 units
3 July 2001 – 2 January 2002	Interest rate: 10.00 %	Sum: 5 units
3 January 2002 – 2 April 2002	Interest rate: 9.50 %	Sum: 2 units
3 April 2002 – 30 June 2002	Interest rate: 10.00 %	Sum: 2 units
1 July 2002 – 31 December 2002	Interest rate: 12.50 %	Sum: 6 units
1 January 2003 – 30 June 2003	Interest rate: 12.00 %	Sum: 6 units
1 July 2003 – 30 June 2004	Interest rate: 11.00 %	Sum: 11 units
1 July 2004 – 30 June 2005	Interest rate: 10.00 %	Sum: 10 units
1 July 2005 – 30 June 2006	Interest rate: 9.50 %	Sum: 10 units
1 July 2006 – 31 December 2006	Interest rate: 10.50 %	Sum: 5 units
1 January 2007 – 30 June 2007	Interest rate: 11.00 %	Sum: 5 units
1 July 2007 – 31 December 2007	Interest rate: 11.50 %	Sum: 6 units
1 January 2008 – 30 June 2008	Interest rate: 12.00 %	Sum: 6 units
1 July 2008 – 31 December 2008	Interest rate: 12.50 %	Sum: 6 units
1 January 2009 – 30 June 2009	Interest rate: 10.00 %	Sum: 5 units
1 July 2009 – 31 December 2010	Interest rate: 8.50 %	Sum: 13 units
1 January 2011 – 30 June 2011	Interest rate 9.50 %	Sum: 5 units
1 July 2011 – 30 June 2012	Interest rate 10.00 %	Sum: 10 units
1 July 2012 – 31 December 2012	Interest rate 9.50 %	Sum: 5 units
1 January 2013 – 31 December 2013	Interest rate 9.00 %	Sum: 9 units
1 January 2014 – 12 February 2014	Interest rate 9.00 %	Sum: 1 unit

**Sum total**

15 November 1993 – 12 February 2014 215 units

**Harm incurred 17 September 1996**

Amount of harm: 100 units.

Interest amounts payable (rounded to full units for convenience of presentation and calculation):

17 September 1996 – 1 October 1996	Interest rate: 12.50 %	Sum: 1 unit
2 October 1996 – 2 January 1997	Interest rate: 11.50 %	Sum: 3 units
3 January 1997 – 1 July 1998	Interest rate: 10.50 %	Sum: 16 units
2 July 1998 – 4 January 1999	Interest rate: 10.00 %	Sum: 5 units
5 January 1999 – 5 April 1999	Interest rate: 9.50 %	Sum: 2 units
6 April 1999 – 3 October 1999	Interest rate: 9.00 %	Sum: 4 units
4 October 1999 – 3 April 2000	Interest rate: 9.50 %	Sum: 5 units
4 April 2000 – 30 June 2000	Interest rate: 10.50 %	Sum: 3 units
1 July 2000 – 2 April 2001	Interest rate: 10.00 %	Sum: 8 units
3 April 2001 – 2 July 2001	Interest rate: 9.50 %	Sum: 2 units
3 July 2001 – 2 January 2002	Interest rate: 10.00 %	Sum: 5 units
3 January 2002 – 2 April 2002	Interest rate: 9.50 %	Sum: 2 units
3 April 2002 – 30 June 2002	Interest rate: 10.00 %	Sum: 2 units
1 July 2002 – 31 December 2002	Interest rate: 12.50 %	Sum: 6 units
1 January 2003 – 30 June 2003	Interest rate: 12.00 %	Sum: 6 units
1 July 2003 – 30 June 2004	Interest rate: 11.00 %	Sum: 11 units
1 July 2004 – 30 June 2005	Interest rate: 10.00 %	Sum: 10 units
1 July 2005 – 30 June 2006	Interest rate: 9.50 %	Sum: 10 units



1 July 2006 – 31 December 2006	Interest rate: 10.50 %	Sum: 5 units
1 January 2007 – 30 June 2007	Interest rate: 11.00 %	Sum: 5 units
1 July 2007 – 31 December 2007	Interest rate: 11.50 %	Sum: 6 units
1 January 2008 – 30 June 2008	Interest rate: 12.00 %	Sum: 6 units
1 July 2008 – 31 December 2008	Interest rate: 12.50 %	Sum: 6 units
1 January 2009 – 30 June 2009	Interest rate: 10.00 %	Sum: 5 units
1 July 2009 – 31 December 2010	Interest rate: 8.50 %	Sum: 13 units
1 January 2011 – 30 June 2011	Interest rate 9.50 %	Sum: 5 units
1 July 2011 – 30 June 2012	Interest rate 10.00 %	Sum: 10 units
1 July 2012 – 31 December 2012	Interest rate 9.50 %	Sum: 5 units
1 January 2013 – 31 December 2013	Interest rate 9.00 %	Sum: 9 units
1 January 2014 – 12 February 2014	Interest rate 9.00 %	Sum: 1 unit
<b>Sum total</b>		
17 September 1996 – 12 February 2014		177 units

### **Harm incurred 22 February 2006**

Amount of harm: 100 units.

Interest amounts payable (rounded to full units for convenience of presentation and calculation):

22 February 2006 – 30 June 2006	Interest rate: 9.50 %	Sum: 3 units
1 July 2006 – 31 December 2006	Interest rate: 10.50 %	Sum: 5 units
1 January 2007 – 30 June 2007	Interest rate: 11.00 %	Sum: 5 units
1 July 2007 – 31 December 2007	Interest rate: 11.50 %	Sum: 6 units
1 January 2008 – 30 June 2008	Interest rate: 12.00 %	Sum: 6 units
1 July 2008 – 31 December 2008	Interest rate: 12.50 %	Sum: 6 units
1 January 2009 – 30 June 2009	Interest rate: 10.00 %	Sum: 5 units
1 July 2009 – 31 December 2010	Interest rate: 8.50 %	Sum: 13 units
1 January 2011 – 30 June 2011	Interest rate 9.50 %	Sum: 5 units
1 July 2011 – 30 June 2012	Interest rate 10.00 %	Sum: 10 units
1 July 2012 – 31 December 2012	Interest rate 9.50 %	Sum: 5 units
1 January 2013 – 31 December 2013	Interest rate 9.00 %	Sum: 9 units
1 January 2014 – 12 February 2014	Interest rate 9.00 %	Sum: 1 unit
<b>Sum total</b>		
22 February 2006 – 12 February 2014		79 units

### **Harm incurred 12 August 2008**

Amount of harm: 100 units.

Interest amounts payable (rounded to full units for convenience of presentation and calculation):

12 August 2008 – 31 December 2008	Interest rate: 12.50 %	Sum: 5 units
1 January 2009 – 30 June 2009	Interest rate: 10.00 %	Sum: 5 units
1 July 2009 – 31 December 2010	Interest rate: 8.50 %	Sum: 13 units
1 January 2011 – 30 June 2011	Interest rate 9.50 %	Sum: 5 units
1 July 2011 – 30 June 2012	Interest rate 10.00 %	Sum: 10 units
1 July 2012 – 31 December 2012	Interest rate 9.50 %	Sum: 5 units
1 January 2013 – 31 December 2013	Interest rate 9.00 %	Sum: 9 units
1 January 2014 – 12 February 2014	Interest rate 9.00 %	Sum: 1 unit
<b>Sum total</b>		
12 August 2008 – 12 February 2014		53 units

- (SE.33) The sum total of interest accrued under this alternative would be 524 units. The total amount the jointly liable defendants would have to pay on 12 February 2014 in order to relinquish their debt towards the claimant would therefore be 924 units.

### **Third alternative**

- (SE.34) Bearing in mind the very high amount of interest accrued under the second alternative, a third set of calculations is warranted. Under this second alternative, calculations have been carried out using in the same manner as under the second, but the rate applicable under the Swedish Interest Act has been substituted for the interest for earnings set in its s 2 ss 2 for the period from the occurrence of harm up until the day before service of summons to court.
- (SE.35) Following the service of summons, the calculations are equivalent to those under Alternative 1 above.

### **Harm incurred 15 November 1993**

Amount of harm: 100 units.

Interest amounts payable (rounded to full units for convenience of presentation and calculation):

15 November 1993 – 3 January 1994	Interest rate 7.00 %	Sum: 1 unit
4 January 1994 – 3 July 1994	Interest rate: 6.50 %	Sum: 3 units
4 July 1994 – 3 October 1994	Interest rate: 7.50 %	Sum: 2 units
4 October 1994 – 3 July 1995	Interest rate: 9.00 %	Sum: 7 units
4 July 1995 – 5 October 1995	Interest rate: 9.50 %	Sum: 2 units
6 October 1995 – 2 January 1996	Interest rate: 9.00 %	Sum: 2 units
3 January 1996 – 1 April 1996	Interest rate: 8.00 %	Sum: 2 units
2 April 1996 – 1 July 1996	Interest rate: 7.50 %	Sum: 2 units
2 July 1996 – 1 October 1996	Interest rate: 6.50 %	Sum: 2 units
2 October 1996 – 2 January 1997	Interest rate: 5.50 %	Sum: 1 unit
3 January 1997 – 1 July 1998	Interest rate: 4.50 %	Sum: 7 units
2 July 1998 – 4 January 1999	Interest rate: 4.00 %	Sum: 2 units
5 January 1999 – 5 April 1999	Interest rate: 3.50 %	Sum: 1 unit
6 April 1999 – 3 October 1999	Interest rate: 3.00 %	Sum: 1 unit
4 October 1999 – 3 April 2000	Interest rate: 3.50 %	Sum: 2 units
4 April 2000 – 30 June 2000	Interest rate: 4.50 %	Sum: 1 unit
1 July 2000 – 2 April 2001	Interest rate: 4.00 %	Sum: 3 units
3 April 2001 – 2 July 2001	Interest rate: 3.50 %	Sum: 1 unit
3 July 2001 – 2 January 2002	Interest rate: 4.00 %	Sum: 2 units
3 January 2002 – 2 April 2002	Interest rate: 3.50 %	Sum: 1 unit
3 April 2002 – 30 June 2002	Interest rate: 4.00 %	Sum: 1 unit
1 July 2002 – 31 December 2002	Interest rate: 6.50 %	Sum: 3 units
1 January 2003 – 30 June 2003	Interest rate: 6.00 %	Sum: 3 units
1 July 2003 – 30 June 2004	Interest rate: 5.00 %	Sum: 5 units
1 July 2004 – 30 June 2005	Interest rate: 4.00 %	Sum: 4 units
1 July 2005 – 30 June 2006	Interest rate: 3.50 %	Sum: 4 units
1 July 2006 – 31 December 2006	Interest rate: 4.50 %	Sum: 2 units
1 January 2007 – 30 June 2007	Interest rate: 5.00 %	Sum: 2 units
1 July 2007 – 31 December 2007	Interest rate: 5.50 %	Sum: 3 units
1 January 2008 – 30 June 2008	Interest rate: 6.00 %	Sum: 3 units
1 July 2008 – 31 December 2008	Interest rate: 6.50 %	Sum: 3 units
1 January 2009 – 30 June 2009	Interest rate: 4.00 %	Sum: 2 units

1 July 2009 – 29 November 2010	Interest rate: 2.50 %	Sum: 4 units
30 November – 31 December 2010	Interest rate: 8.50 %	Sum: 1 unit
1 January 2011 – 30 June 2011	Interest rate 9.50 %	Sum: 5 units
1 July 2011 – 30 June 2012	Interest rate 10.00 %	Sum: 10 units
1 July 2012 – 31 December 2012	Interest rate 9.50 %	Sum: 5 units
1 January 2013 – 31 December 2013	Interest rate 9.00 %	Sum: 9 units
1 January 2014 – 12 February 2014	Interest rate 9.00 %	Sum: 1 unit
<b>Sum total</b>		
15 November 1993 – 12 February 2014		115 units

### Harm incurred 17 September 1996

Amount of harm: 100 units.

Interest amounts payable (rounded to full units for convenience of presentation and calculation):

17 September 1996 – 1 October 1996	Interest rate: 6.50 %	Sum: 0 units
2 October 1996 – 2 January 1997	Interest rate: 5.50 %	Sum: 1 unit
3 January 1997 – 1 July 1998	Interest rate: 4.50 %	Sum: 7 units
2 July 1998 – 4 January 1999	Interest rate: 4.00 %	Sum: 2 units
5 January 1999 – 5 April 1999	Interest rate: 3.50 %	Sum: 1 unit
6 April 1999 – 3 October 1999	Interest rate: 3.00 %	Sum: 1 unit
4 October 1999 – 3 April 2000	Interest rate: 3.50 %	Sum: 2 units
4 April 2000 – 30 June 2000	Interest rate: 4.50 %	Sum: 1 unit
1 July 2000 – 2 April 2001	Interest rate: 4.00 %	Sum: 3 units
3 April 2001 – 2 July 2001	Interest rate: 3.50 %	Sum: 1 unit
3 July 2001 – 2 January 2002	Interest rate: 4.00 %	Sum: 2 units
3 January 2002 – 2 April 2002	Interest rate: 3.50 %	Sum: 1 unit
3 April 2002 – 30 June 2002	Interest rate: 4.00 %	Sum: 1 unit
1 July 2002 – 31 December 2002	Interest rate: 6.50 %	Sum: 3 units
1 January 2003 – 30 June 2003	Interest rate: 6.00 %	Sum: 3 units
1 July 2003 – 30 June 2004	Interest rate: 5.00 %	Sum: 5 units
1 July 2004 – 30 June 2005	Interest rate: 4.00 %	Sum: 4 units
1 July 2005 – 30 June 2006	Interest rate: 3.50 %	Sum: 4 units
1 July 2006 – 31 December 2006	Interest rate: 4.50 %	Sum: 2 units
1 January 2007 – 30 June 2007	Interest rate: 5.00 %	Sum: 2 units
1 July 2007 – 31 December 2007	Interest rate: 5.50 %	Sum: 3 units
1 January 2008 – 30 June 2008	Interest rate: 6.00 %	Sum: 3 units
1 July 2008 – 31 December 2008	Interest rate: 6.50 %	Sum: 3 units
1 January 2009 – 30 June 2009	Interest rate: 4.00 %	Sum: 2 units
1 July 2009 – 29 November 2010	Interest rate: 2.50 %	Sum: 4 units
30 November – 31 December 2010	Interest rate: 8.50 %	Sum: 1 unit
1 January 2011 – 30 June 2011	Interest rate 9.50 %	Sum: 5 units
1 July 2011 – 30 June 2012	Interest rate 10.00 %	Sum: 10 units
1 July 2012 – 31 December 2012	Interest rate 9.50 %	Sum: 5 units
1 January 2013 – 31 December 2013	Interest rate 9.00 %	Sum: 9 units
1 January 2014 – 12 February 2014	Interest rate 9.00 %	Sum: 1 unit
<b>Sum total</b>		
17 September 1996 – 12 February 2014		92 units

**Harm incurred 22 February 2006**

Amount of harm: 100 units.

Interest amounts payable (rounded to full units for convenience of presentation and calculation):

22 February 2006 – 30 June 2006	Interest rate: 3.50 %	Sum: 1 unit
1 July 2006 – 31 December 2006	Interest rate: 4.50 %	Sum: 2 units
1 January 2007 – 30 June 2007	Interest rate: 5.00 %	Sum: 2 units
1 July 2007 – 31 December 2007	Interest rate: 5.50 %	Sum: 3 units
1 January 2008 – 30 June 2008	Interest rate: 6.00 %	Sum: 3 units
1 July 2008 – 31 December 2008	Interest rate: 6.50 %	Sum: 3 units
1 January 2009 – 30 June 2009	Interest rate: 4.00 %	Sum: 2 units
1 July 2009 – 29 November 2010	Interest rate: 2.50 %	Sum: 4 units
30 November – 31 December 2010	Interest rate: 8.50 %	Sum: 1 unit
1 January 2011 – 30 June 2011	Interest rate 9.50 %	Sum: 5 units
1 July 2011 – 30 June 2012	Interest rate 10.00 %	Sum: 10 units
1 July 2012 – 31 December 2012	Interest rate 9.50 %	Sum: 5 units
1 January 2013 – 31 December 2013	Interest rate 9.00 %	Sum: 9 units
1 January 2014 – 12 February 2014	Interest rate 9.00 %	Sum: 1 unit
<b>Sum total</b>		
22 February 2006 – 12 February 2014		51 units

**Harm incurred 12 August 2008**

Amount of harm: 100 units.

Interest amounts payable (rounded to full units for convenience of presentation and calculation):

12 August 2008 – 31 December 2008	Interest rate: 6.50 %	Sum: 3 units
1 January 2009 – 30 June 2009	Interest rate: 4.00 %	Sum: 2 units
1 July 2009 – 29 November 2010	Interest rate: 2.50 %	Sum: 4 units
30 November – 31 December 2010	Interest rate: 8.50 %	Sum: 1 unit
1 January 2011 – 30 June 2011	Interest rate 9.50 %	Sum: 5 units
1 July 2011 – 30 June 2012	Interest rate 10.00 %	Sum: 10 units
1 July 2012 – 31 December 2012	Interest rate 9.50 %	Sum: 5 units
1 January 2013 – 31 December 2013	Interest rate 9.00 %	Sum: 9 units
1 January 2014 – 12 February 2014	Interest rate 9.00 %	Sum: 1 unit
<b>Sum total</b>		
12 August 2008 – 12 February 2014		40 units

- (SE.36) The sum total of interest accrued under this alternative would be 298 units. The total amount the jointly liable defendants would have to pay on 12 February 2014 in order to relinquish their debt towards the claimant would therefore be 698 units.

**Part III. Procedural aspects****16. Does the judge award interest ex officio or does the claimant have to request it?**

- (SE.37) The claimant must request interest in order for it to be included in the award ordered by the court. Judges might inquire whether the claimant wishes to request interest.

**17. Can the judge award a higher interest amount than requested by the claimant or does the principle of *ne ultra petita* apply?**

(SE.38) No. Although not all aspects of competition law litigation are at the disposal of the parties, the discretion of judges is limited to the claims of the parties in this respect.

**18. Can the judge estimate interest or does interest always have to be calculated?**

(SE.39) The courts will order the payment of interest and specify the applicable rule and dates. In this context, the phrase used is commonly that damages are awarded “with interest in accordance with section 6 of the Interest Act, accruing from [date in accordance with answer to question 9] and until payment”.

(SE.40) In theory, subsequent proceedings could be brought with regard to the proper calculation of interest, but given the clarity of the applicable rules and rates this is not likely to occur.

**19. If the claimant changes the request regarding the interest, is this regarded as an amendment of the pleadings? Is this only possible until a certain stage into the proceedings and precluded later on or can the claimant make such changes without negative procedural consequences at any time up to the judgment?**

(SE.41) In principle, the claimant is allowed to add a claim for interest to the main damages claim at any point in the proceedings before the court adjudicating at first instance. This should include expansions of a claim for interest. If the main hearing has commenced, such a new claim can be rejected by the court if it cannot be tried without inconvenience. New claims for interest are barred on appeal.<sup>711</sup>

(SE.42) The claimant is always at liberty to limit the original claim for interest.

***Part IV Specific instances***

**20. Identify any cases relating to damages claims for infringements of competition law and explain how interest was calculated. In writing these summaries, provide all relevant information about how interest was calculated, so that this information can be passed on to another country reporter who can try and estimate how interest would be calculated in another jurisdiction.**

(SE.43) Although since 2000 some 30 claims for damages have been brought before the Stockholm City Court, which has non-exclusive competence to adjudicate all such claims at first instance, only one judgment awarding damages has been passed by that court.<sup>712</sup> This judgment, which will now be analysed with regard to the issue of interest awarded, in joined cases *Europe Investor Direct Aktiebolag et al v VPC Aktiebolag* (T 32799-05) and *OÜ E-Direct v VPC Aktiebolag* (T 34227-05) was passed by the Stockholm City Court on 20 November 2008. The

<sup>711</sup> Swedish Code of Judicial procedure (*Rättegångsbalken* 1942:740) chapter 13, s 3 ss 1-2.

<sup>712</sup> Damages claims brought before other competent courts of first instance are not known to the author of this report, in spite of consulting judge dr Ingeborg Simonsson of Stockholm City Court (and associate professor at Stockholm University) on that issue. In restitution, it is worth mentioning *SAS v Luftfartsverket*, Göta hovrätt Court of Appeal T 33-00 (reported by Ulf Bernitz, ‘The Arlanda Terminal 2 Case: Substantial damages for Breach of Article 82 EC’ (2003) 2 Competition Law Journal 195, the title of the article erroneously suggesting that the award was of damages). A few follow-on actions to the TeliaSonera margin squeeze (cf case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-527) are pending before the Stockholm City Court.

cases were appealed to the Svea hovrätt Court of Appeal, which passed judgment on 19 January 2011. On appeal, the Swedish Supreme Court refused leave for appeal by decision on 25 May 2012.

- (SE.44) **Facts:** VPC Aktiebolag (VPC) administered the exchange of shares in listed companies at the Stockholm stock exchange. The claimants (Europe Investor Direct Aktiebolag (EID), Rutger Kahn Kommanditbolag (RKK), and OÜ E-Direct (OED)) bought lists of shareholders in listed companies from VPC in order to target marketing efforts at shareholders. In the 1990s, such lists were sold to the claimants by VPC at a price of approximately SEK 25 000. About the end of 1998 or beginning of 1999, VPC refused to continue to deliver complete lists to the claimants. The claimants therefore brought actions for damages against VPC before Stockholm City Court, arguing that VPC had abused a dominant position and thereby caused them harm. The Stockholm City Court issued summons to court to VPC, the service of which occurred on 14 March 2006.
- (SE.45) Both Stockholm City Court and Svea hovrätt Court of Appeal held that VPC had abused a dominant position by refusing to deliver the information requested by the claimants, and ordered VPC to pay damages.

**Judgment:**

- (SE.46) The *Stockholm City Court* approximated the harm incurred by the claimants at SEK 1 700 000 for EID, SEK 1 100 000 for RKK, and SEK 1 100 000 for OED.
- (SE.47) With regard to the calculation of interest, the court noted that, at the time of service of summons to VPC, EID had claimed only SEK 800 000. EID had raised its claim to SEK 3 441 000 by notice to the court on 21 November 2006. Service of the new claim to VPC's counsel occurred on 30 November 2006. Therefore, the court held, interest payable to EID accrued on SEK 800 000 from 14 March 2006 until payment was made, but on the remaining SEK 900 000 of the damages payable interest would accrue from 30 November 2006 until payment was made.
- (SE.48) In respect of damages payable to RKK and OED, the court held that interest accrued on the amounts of damages payable from 14 March 2006 until payment was made. The *Svea hovrätt Court of Appeal* approximated the harm incurred by the claimants at SEK 800 000 for EID, SEK 550 000 for RKK, and SEK 550 000 for OED. The court of appeal held that interest accrued on all amounts of damages payable from 14 March 2006 until payment was made.<sup>713</sup>

**Relevant information for other jurisdictions:**

- (SE.49) Neither the courts nor the parties have endeavoured to fix exact dates for relevant events, most probably because of the lack of direct relevance of such exact dates to the estimation of damages and the calculation of interest on damages. The following data can nevertheless be exacted from the reasoning of the courts and the parties:
- (SE.50) About the end of 1998 or beginning of 1999, with no prior warning, VPC reduced the contact information available in the lists of shareholders delivered to the claimants, by omitting eg postal addresses.

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<sup>713</sup> The court of appeal did not elaborate on interest payable to EID. Probably, the court took the view that interest accrued on the full amount of damages payable as it matched the amount first claimed.

- (SE.51) In February 2000, the claimants requested complete lists on CD-ROM, but were denied this. The claimants also requested printed lists but were vaguely informed that the price for such lists would be several million SEK.
- (SE.52) In October 2000, the claimants were informed that the price for printed lists would be SEK 1 185 615 (no VAT added).
- (SE.53) In March 2001, the claimants were informed that the price for printed lists would be SEK 541 000 (no VAT added).
- (SE.54) In October 2001, the claimants were informed that the price for printed lists would be SEK 271 000 (no VAT added). By this time, the Svea hovrätt Court of Appeal held that the abuse of a dominant position ceased.
- (SE.55) In the summer of 2004, the claimants bought printed lists from VPC for SEK 210 675 (no VAT added).

**21. Are the rules on the award of interest specific to the kinds of claim or general principles? Are there any specific approaches/rules that you can identify in national or EU competition cases, or in other cases where the claim is brought by business against business (B2B) and are there any specific approaches/rules in business versus consumer (B2C) cases?**

- (SE.56) The applicable rules are laid down in the Swedish Interest Act. The relevant rules are of general application and not specific to competition law, B2B or B2C.
- (SE.57) The Interest Act does not distinguish contractual from non-contractual damages. The applicable rule (in section 4 sub-section 3) applies to both forms of damages.

***Part V. Evaluation, interpretation in conformity with EU law, and intertemporal aspect***

**22. How satisfactory are the rules on the calculation of interest perceived to be? In considering this question, identify any law reform proposals in the last 15 years or so, or any major judgments by the higher courts that call into question or change some of the issues pertaining to the award of damages. Please identify changes of relevant national law on interest that will come into force or are currently considered.**

- (SE.58) In general, the Interest Act has rarely been changed since its entry into force in 1976. It was mentioned under question 11 that the rules of the Interest Act have, in the aspects relevant to the calculation of interest on damages, remained intact since 1 July 1984, when the percentage added to the *Riksbanken* discount rate was increased from 4 to 8 per cent.
- (SE.59) To the best of my knowledge, there are currently no plans to change or amend the rules of the Swedish Interest Act. No such initiatives have been announced on the web site of the Swedish Government.<sup>714</sup> Informal contacts with the Ministry of Justice also suggest that no such

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<sup>714</sup> <http://www.regeringen.se>.

projects are active, although it has been noticed by the Ministry that in a recent case the award of interest was higher than the main award of damages.<sup>715</sup>

- 23. Assess the compliance of the national interest rules with the minimum standard prescribed by EU law set out above (“full compensation”). If national law does not grant full compensation, please try to identify an interpretation of national law that guarantees full compensation in conformity with European law. Given that the principle of full compensation is based on directly applicable EU law, please confirm that national courts have to apply it also in relation to past infringements of EU competition law (e.g. cartels starting in the 1990ies and ending in the 2000er years).**

- (SE.60) From the perspective of EU law, one might consider the starting point of the accrual of damages in the Interest Act as being late – interest does not start to accrue when harm occurs, but on the 30th day following the presentation, by the claimant, of the claim for damages and the investigation that can reasonably be required by the claimant under the circumstances,<sup>716</sup> or alternatively on the date of service of an application for a payment order with the Swedish Enforcement Authority (*Kronofogdemyndigheten*) or service of summons to court.<sup>717</sup> However, rules on interest on damages in the Swedish Interest Act are quite stringent with regard to the calculation of interest. As has become evident, the applicable rates are comparatively high. In the view of this reporter, rec 12 of Directive 2014/104/EU and the holdings of the European Court of Justice in case C-565/11 *Irimie* make it plausible, but not certain, that if requested to rule on the start of accrual of interest on damages arising from an infringement of EU competition law, the Court of Justice may rule that it must accrue from the day on which harm occurred.
- (SE.61) Therefore, it is submitted that the starting point for the accrual of interest should not as such lead to the conclusion that the rules of the Interest Act do not comply with the EU law concept of full compensation, as used by the European Court of Justice in eg *Marshall II*.<sup>718</sup> Nevertheless, it cannot be excluded either that the Swedish starting point for the accrual of interest is contrary to Directive 2014/104/EU and/or the EU law principle of effectiveness. Therefore, a few comments will be made regarding the scenario that the Swedish starting point cannot be upheld.
- (SE.62) The relevant statutory provisions of the Swedish Interest Act on interest for delay are precise and cannot be interpreted so as to be applied in conformity with rec 12 of Directive 2014/104/EU and the ECJ case law on full compensation, eg with the holdings of the Court in the *Irimie* case. By contrast, s 2 ss 2 on interest for earnings might plausibly be interpreted as to apply where harm has been incurred in the form of an overcharge. Under certain circumstances however,<sup>719</sup> the action could be for restitution just as well as for damages. Accordingly, there is some room for argument that the two actions should be treated equally, and therefore that interest for earnings should accrue from the day on which the overcharge was paid even if the action is for damages. On the one hand, Swedish courts generally favour

<sup>715</sup> *Prosolvias v Öhrlings PriceWaterhouseCoopers et al*, Hovrätten för västra Sverige Court of Appeal, T 4207-10 (judgment passed 15 August 2013). Main damages ordered was SEK 890 000 000, interest payable was approximately SEK 1 100 000 000.

<sup>716</sup> Swedish Interest Act, s 4 ss 3.

<sup>717</sup> Swedish Interest Act, s 4 ss 4.

<sup>718</sup> Case C-271/91 *M Helen Marshall v Southampton and South-West Hampshire Area Health Authority (Marshall II)* [1993] ECR I-4367, para 31.

<sup>719</sup> Eg those in case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297.



pragmatism over formalism, and they might thus be expected to endeavor to find a way to reconcile conflicting interests and find a reasonable solution. On the other hand, Swedish courts are generally reluctant to abandon well-established national rules, such as those in the Interest Act, unless unequivocally instructed to do so by precedence to that effect. Therefore, it is likely that a Swedish court confronted by the potential conflict between EU law and the Interest Act with regard to the accrual of interest on competition damages would stay proceedings and refer that issue to be resolved by the European Court of Justice. Indeed, the Stockholm City Court is very well aware of this problem and would not hesitate to make a reference. If a Swedish court (not adjudicating at last instance) would choose not to refer this issue to the Court of Justice, such a court would most likely disregard the problem and award interest in accordance with the existing provisions of the Interest Act. In any event, Swedish courts should consider the second alternative unreasonably burdensome for defendants. For the sake of argument, it has been indicated above that the third alternative might be chosen if circumstances were such that an action for restitution might be available instead of, or parallel to, the action for damages. Under such circumstances, a court might plausibly be convinced by an argument that a damages claimant should not suffer adverse consequences from artificial distinctions between actions, but be able to seek compensation for the lapse of time just as a claimant for restitution pursuant to the nullity or avoidance of a contract. This is however speculation.

- (SE.63) Of course, these difficulties would also be avoided if Sweden would enact special statutory provisions on the accrual of interest for the proper implementation of Directive 2014/104/EU. As *lex specialis*, such special statutory provisions would be given priority over the general provisions of the Interest Act.<sup>720</sup> It would then be possible also to allow such implementing provisions to have retroactive effect.

**24. Regarding the secondary subject of investigation (interest on damages due to infringements of national competition law only): The proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union,<sup>721</sup> if adopted, would make the rules of European Law as outlined above applicable to infringements of national competition law. Article 2 (Right to full compensation), paragraph 2 stipulates exactly those: “Full compensation shall place anyone who has suffered harm in the position in which that person would have been had the infringement not been committed. It shall therefore include compensation for actual loss and for loss of profit, and payment of interest from the time the harm occurred until the compensation in respect of that harm has actually been paid.” Would the right to full compensation as set out by Article 2 of the proposed directive apply to interest calculation for damages in cases where only national competition law has been infringed and the damage occurred before the implementation of the directive came into force?**

- (SE.64) As infringements of national competition law only, ie infringements that have no appreciable effect on trade between Member States within the meaning of Article 101(1) TFEU, do not fall within the scope of Directive 2014/104/EU, the rule in Article (now) 3(2) of the directive does not apply to such infringements of national competition law only.

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<sup>720</sup> Swedish Interest Act, s 1 ss 2.

<sup>721</sup> 2013/0185 (COD).

- (SE.65) Of course, it is plausible for the interest rules applying to competition law damages to be changed by virtue of Article 3(2) and recital 12 of Directive 2014/104/EU in the course of Swedish implementation of the directive. However, if the accrual of interest was to begin at the time when the harm occurred, as recommended in recital 12, the interest rate would probably need to be lowered in respect of competition law damages, in order to keep the award of interest payable from becoming unreasonably burdensome to defendants by reason of the relatively high rate provided for by the Swedish Interest Act. In my opinion, it is not likely for such a special interest regime to be introduced by the Swedish legislature for the purposes of competition law damages.

## United Kingdom

Katarzyna Marita Szreder\*

### *Preliminary Matters*

- (UK.1) Competition law claims for damages in the United Kingdom (UK) can be divided between stand-alone and follow-on cases.<sup>722</sup> The latter can be brought before the Competition Appeal Tribunal (CAT), whereas the former need to be decided by the ordinary courts.<sup>723</sup> No distinction is made between breaches of national and EU competition rules in damages claims. As will become clear below, English law on interest is characterised by a wide discretion left to the judges.
- (UK.2) Since there is a scarcity of case-law specifically on the point of interest on damages due to infringement of competition law, the following report is largely based on interpretation of legal provisions and general case-law.
- (UK.3) It is to be understood that no major changes occurred in the law since 1985, although the possibility of bringing follow-on actions before the CAT was introduced only from 1 April 2003 when the Enterprise Act 2002 came into force. A recent decision of the House of Lords in *Sempre Metals* was also significant for clarifying the position on availability of interest at common law.<sup>724</sup> Consequently, in an action for damages pending before a national court/tribunal the same rules on calculation of interest would apply to claims dating back to 1985.

### *Section I. General Principles*

#### **1.1. What is interest? Is there a definition?**

- (UK.4) There exists no established definition of interest as such, but there exist statutory provisions that regulate the rate of interest and the circumstances in which the courts may award it. The courts also retain jurisdiction to award interest at common law and in equity.<sup>725</sup> The difference between interest awarded under statutory provisions and at common law is that the former is interest *on* damages and the latter is interest *as* damages.<sup>726</sup>

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<sup>722</sup> Follow-on actions can be brought under Section 47A or Section 47B of the Competition Act 1998.

<sup>723</sup> Schedule 8 to the Consumer Rights Bill is intended to change that situation and allow stand-alone cases before the CAT as well. It will also reform the procedures applying to collective actions (Section 47B of the Competition Act 1998). The Bill is expected to go to the Committee Stage in the House of Lords in mid-October 2014.

<sup>724</sup> *Sempre Metals v Inland Revenue Commissioners* [2008] AC 561.

<sup>725</sup> However, obtaining a restitutionary relief in a competition law claim might be difficult (cf. *Devenish Nutrition Ltd v Sanofi-Aventis SA and Others* [2007] EWHC 2394 (Ch)).

<sup>726</sup> McGregor, H. (2009), *McGregor on Damages*, 18<sup>th</sup> ed., Sweet & Maxwell, London, United Kingdom, para. 15-067. Since interest at common law is awarded as damages, it is subject to all general rules applying to damages, including rules on remoteness and mitigation of loss (cf. *supra* note 3).

**1.2. When, and under what conditions, is interest payable at all? Does this depend on whether the claim is brought in tort, breach of contract or (where applicable) restitution/unjust enrichment?**

(UK.5) Interest can be awarded regardless of the basis under which the claim is brought. However, under statutory provisions the courts can award only simple interest, whereas at common law<sup>727</sup> and in equity ('restitutionary claims') courts retain discretion to award compound interest.

**1.3. Is payment of interest compulsory or at the discretion of the court?**

(UK.6) Except for personal injury and fatal accident cases, payment of interest is at the discretion of the courts. This holds true equally for claims brought before ordinary courts and before the CAT. The discretion extends not only to the decision whether or not to award interest, but also the rate of interest, the period over which interest is calculated and the sum over which it is calculated. The courts are free to calculate interest differently for different periods.

**1.4. What is said to be the purpose of the interest payment?**

(UK.7) "An award of interest is intended to compensate a claimant from being kept out of his money".<sup>728</sup>

**1.5. What is the legal basis for the payment of interest (statutes, contractual agreements, case-law, soft law guidance)?**

(UK.8) Follow-on cases before the CAT are decided under the CAT Rules (SI 2003 No. 1372) made pursuant to the Enterprise Act 2002. The relevant provision is Rule 56(2) which clarifies that the CAT may award interest on damages on "*all or any part of the damages*" for "*all or any part of the period between the cause of action arose*" and the date of payment or the date the sum was awarded. Unless the CAT directs otherwise, the rate of interest shall not exceed the rate specified in any Order made pursuant to Section 44 of the Administration of Justice Act 1970. Section 44 of the Administration of Justice Act 1970 allows Lord Chancellor to amend by Order Section 17 of the Judgments Act 1838, specifying the rate of interest on judgment debts.<sup>729</sup> Since 1993 this is set at 8.00 per cent.

(UK.9) When it comes to stand-alone or follow-on cases brought before ordinary courts, the relevant provisions are Section 35A of the Senior Courts Act 1981 and its equivalent, Section 69 of the County Courts Act 1984. Both sections leave the decision whether to award interest, and if so at what rate, to the courts. Section 35A(6) further specifies that interest "*may be calculated at different rates in respect of different periods*". The only limitation of the courts' discretion is that interest has to be simple (Section 35A(1)). Both of these provisions, however, are subject to the rules of court, which provide further guidance on the award of interest.

(UK.10) As already stated above, the courts also retain jurisdiction to award interest at common law. One has to look for case-law as a legal basis for such claims.<sup>730</sup>

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<sup>727</sup> Following *supra* note 3.

<sup>728</sup> *2 Travel Group Plc (in liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19.

<sup>729</sup> Judgment debt is a sum of money that a court has ordered a person to pay.

<sup>730</sup> The leading case in this area is *Sempra Metals* (cf. *supra* note 3).

**1.6. What are the procedures for the party seeking to receive interest on the damages paid? (for example, does the claimant have to make a separate plea for the interest payments and if so, what information and evidence must be supplied?)**

- (UK.11) CAT Rules are not very specific when it comes to the procedure before the CAT. Rule 32(3)(c) specifies only that the claim form should contain a “*statement of the amount claimed in damages, supported with evidence of losses incurred and of any calculations which have been undertaken to arrive at the claimed amount*”. Presumably, this is to include a calculation of interest claimed. Furthermore, it appears from the case-law that the CAT is prepared to hear arguments specifically on the question of interest.
- (UK.12) The CAT’s jurisdiction extends to the whole of the UK, so the same procedural rules will apply across the country. However, the procedural rules that apply in ordinary courts might differ across the UK. Below is an explanation of the procedural rules as they apply in England and Wales only.
- (UK.13) Civil Procedure Rule (CPR) 16(4) concerns the particulars of the claim and states that a claimant seeking interest must: (1) identify a basis under which he is doing so; and (2) if the claim is for a specified sum of money, (a) state the percentage rate at which it is claimed, (b) the date from which it is claimed, and (c) to which it is calculated (this is to be no later than the date on which the claim form is issued), (d) the total amount of interest, and (e) the daily rate at which interest accrues after that date. Particulars of the claim are to be verified by a statement of truth (CPR Part 22).
- (UK.14) Since interest at common law is awarded as damages, evidence of loss must be provided.

***Section II. Calculation of Interest***

**2.1. What is the rate of interest that is set? How is it arrived at? Are there statutes?**

- (UK.15) Subject to the CAT/court directing otherwise, CAT Rules as well as CPRs on default judgments (Rule 12.6) and admission of claims (Rule 14.14)<sup>731</sup> stipulate that interest claimed should be no higher than that on judgment debts, as specified in Section 17 of the Judgments Act 1838. From 1993 interest on judgment debts is set at 8.00 per cent.<sup>732</sup> Before, from 1985 it was set at 15.00 per cent<sup>733</sup>, and before that from 1982 at 14.00 per cent.<sup>734</sup>
- (UK.16) However, in commercial cases it is the usual practice of the courts to award an interest at a lower rate, usually base rate plus 1.00 per cent.<sup>735</sup> Still, deviations from that practice continue to appear. The only two cases from the CAT dealing with interest on damages (as opposed to interest on penalties) awarded interest at Bank of England base rate plus 2.00 per cent. No explanation was given for the departure from the normal commercial practice. For further details on those cases, see below.
- (UK.17) CAT Practice Direction states that the normal practice of the CAT will be to award Bank of England base rate plus 1.00 per cent, but this is said in relation to interest on penalties, rather

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<sup>731</sup> Where interest is claimed under Section 35A of the Senior Courts Act 1981 or Section 69 of the County Courts Act 1984.

<sup>732</sup> SI 1993/564.

<sup>733</sup> SI 1985/437.

<sup>734</sup> SI 1982/696.

<sup>735</sup> *Supra* note 5, from para. 15-114 to 15-117.

than damages claims. Still, a statement that the CAT “*will apply the rate at which appellants in general can borrow money and will not look at the special position of a particular appellant*” should be of general application.<sup>736</sup>

**2.2. Is interest simple or compound? If the interest is neither simple nor compound as defined above, please elaborate.**

(UK.18) As stated (see above, question 2), interest awarded under statutory provisions can only be simple. The courts, however, retain a jurisdiction at common law to award compound interest. In theory, there is nothing preventing the CAT from awarding compound interest, but so far it has declined to do so.<sup>737</sup>

**2.3. What is the time for which interest is calculated? When does interest start to accrue, when does the accrual of interest end? Are there any situations where the action of the plaintiff, for example delay on his part, serves to change the time for which interest is calculated? Are there provisions for suspension of the accrual of interest?**

(UK.19) Both Section 35A and CAT Rule 56 specify that interest can run for all or any part of the period between the cause of action arose and the date of the judgment/decision. There are no specific provisions for the suspension of the accrual of interest, but specifying the period for which interest runs lies within the courts’/CAT’s discretion.

(UK.20) Although not competition-specific, there have been cases in which the courts considered a reduction of interest due to delay on the part of the claimant. These ranged from breach of contract to claims on insurance policies.<sup>738</sup> Delay may affect the time from and the time to which interest runs, but it hardly ever affects the rate of interest itself.<sup>739</sup> Differing methods of calculation will have differing consequences on the amount ultimately awarded. The shortest delay that led to a reduction in interest was 7 years<sup>740</sup>, while a delay of 9 years commonly leads to a reduction in interest.<sup>741</sup>

(UK.21) The issue of delay is unlikely to arise in follow-on competition cases before CAT, since currently they are subject to a 2-year limitation period.<sup>742</sup>

**2.4. Are there any specific provisions if payment is requested in a different currency than that in the state where the lawsuit is brought? (e.g. a Swedish company claims for damages resulting from an EU-wide cartel against a German cartel member in Germany. Can the court award only EUR or also Swedish Krona?)**

(UK.22) No competition-specific cases were found, but it is generally possible to obtain a damages award and interest on that award in currency other than sterling.<sup>743</sup> In those circumstances the courts are prepared to award interest at a rate at which a person could “reasonably have

<sup>736</sup> Competition Appeal Tribunal (2005), *Guide to Proceedings*, para 18.5.

<sup>737</sup> Cf. question 14 for further details.

<sup>738</sup> Cf. respectively, *First Ferries One SA v Ferries Australia Pty Ltd* [2000] 1 Lloyd’s Rep 534, *Kuwait Airways v Kuwait Insurance* [2001] Lloyd’s Rep I.R. 678; the most common type of cases where delay is pleaded and held relevant are personal injury cases.

<sup>739</sup> *Supra* note 5, para 15-123.

<sup>740</sup> *Read v Harris* [1995] P.I.Q.R. Q34.

<sup>741</sup> *Supra* note 5, para 15-103.

<sup>742</sup> CAT Rule 31.

<sup>743</sup> *Miliangos v George Frank (Textiles)* [1976] AC 443.

borrowed”<sup>744</sup> the foreign currency in the foreign country. For example, US Prime Rate was awarded in *Kuwait Airways v Kuwait Insurance*<sup>745</sup> and in *Mimidoil-Jetoil Greek Petroleum Company SA v Okta Crude Oil Refinery AD*<sup>746</sup>. However, in *Fiona Trust & Holding Corp v Privalov*<sup>747</sup> the rate was set by reference to US LIBOR plus 2.50 per cent, because borrowing by shipping companies was usually effected by reference to that rate.

(UK.23) CAT Rules 2003 do not contain any specific provisions for dealing with awards in foreign currency.

**2.5. As damage claims for infringements of EU competition rules often pertain to long-running infringements, please include all applicable interest rates and the date the rate came into force from 1 January 1985 until today. Unless impossible due to national peculiarities, the rates should be listed in a two column table, containing the rate and the date it came into force. This should be accompanied by a legal retrospective that sets out any other changes to the relevant interest regime (e.g. the time interest starts to run etc.) which occurred over this period, in order to allow a determination of which rules applied at a given point in time between 1 January 1985 and today.**

Table 1 - Interest Rates

Date	Official Bank Rate (Repo Rate 1997-2005, Min Band 1 Dealing Rate until 1996 inclusive)
14/01/1985	11.8750%
28/01/1985	13.8750%
20/03/1985	13.3750%
28/03/1985	12.8750%
19/04/1985	12.3750%
11/07/1985	11.8750%
26/07/1985	11.3750%
15/01/1986	12.3750%
19/03/1986	11.3750%
11/04/1986	10.8750%
18/04/1986	10.3750%
23/05/1986	9.8750%
06/08/1986	10.8750%
09/03/1987	10.3750%
18/03/1987	9.8750%
28/04/1987	9.3750%
08/05/1987	8.8750%
06/08/1987	9.8750%
23/10/1987	9.3750%
04/11/1987	8.8750%
03/12/1987	8.3750%

<sup>744</sup> *Miliangos v George Frank (Textiles) (No 2)* [1977] QB 489.

<sup>745</sup> [2001] Lloyd's Rep I.R. 678.

<sup>746</sup> [2003] 1 Lloyd's Rep 42.

<sup>747</sup> [2011] EWHC 664 (Comm).

01/02/1988	8.8750%
17/03/1988	8.3750%
08/04/1988	7.8750%
17/05/1988	7.3750%
03/06/1988	7.8750%
10/06/1988	8.3750%
24/06/1988	8.8750%
07/07/1988	9.8750%
21/07/1988	10.3750%
08/08/1988	10.8750%
25/08/1988	11.8750%
25/11/1988	12.8750%
25/05/1989	13.7500%
31/08/1989	13.8438%
04/09/1989	13.8750%
08/09/1989	13.7500%
06/10/1989	14.8750%
08/10/1990	13.8750%
13/02/1991	13.3750%
27/02/1991	12.8750%
22/03/1991	12.3750%
12/04/1991	11.8750%
24/05/1991	11.3750%
12/07/1991	10.8750%
04/09/1991	10.3750%
05/05/1992	9.8750%
16/09/1992	12.0000%
22/09/1992	8.8750%
16/10/1992	7.8750%
13/11/1992	6.8750%
26/01/1993	5.8750%
23/11/1993	5.3750%
08/02/1994	5.1250%
12/09/1994	5.6250%
07/12/1994	6.1250%
02/02/1995	6.6250%
13/12/1995	6.3750%
18/01/1996	6.1250%
08/03/1996	5.9375%
06/06/1996	5.6875%
30/10/1996	5.9375%
06/05/1997	6.2500%
06/06/1997	6.5000%
10/07/1997	6.7500%
07/08/1997	7.0000%



06/11/1997	7.2500%
04/06/1998	7.5000%
08/10/1998	7.2500%
05/11/1998	6.7500%
10/12/1998	6.2500%
07/01/1999	6.0000%
04/02/1999	5.5000%
08/04/1999	5.2500%
10/06/1999	5.0000%
08/09/1999	5.2500%
04/11/1999	5.5000%
13/01/2000	5.7500%
10/02/2000	6.0000%
08/02/2001	5.7500%
05/04/2001	5.5000%
10/05/2001	5.2500%
02/08/2001	5.0000%
18/09/2001	4.7500%
04/10/2001	4.5000%
08/11/2001	4.0000%
06/02/2003	3.7500%
10/07/2003	3.5000%
06/11/2003	3.7500%
05/02/2004	4.0000%
06/05/2004	4.2500%
10/06/2004	4.5000%
05/08/2004	4.7500%
04/08/2005	4.5000%
03/08/2006	4.7500%
09/11/2006	5.0000%
11/01/2007	5.2500%
10/05/2007	5.5000%
05/07/2007	5.7500%
06/12/2007	5.5000%
07/02/2008	5.2500%
10/04/2008	5.0000%
08/10/2008	4.5000%
06/11/2008	3.0000%
04/12/2008	2.0000%
08/01/2009	1.5000%
05/02/2009	1.0000%
05/03/2009	0.5000%

Since 5 March 2009 the official bank rate was kept at 0.50 per cent level.

- 2.6. **Please identify an official, reliable, publicly available source that publishes the pertinent legal interest rates as they change.**

(UK.24) Official bank rate (base rate) is published by the Bank of England and is decided by a vote of the Monetary Policy Committee. Minutes of its meetings and tables containing the official bank rate are available online at <http://www.bankofengland.co.uk>.

**2.7. If interest rates change on a fixed schedule, please indicate the schedule.**

(UK.25) There is no fixed schedule for the Monetary Policy Committee's meetings.

**2.8. If part of the debt / the damage is being paid, how is interest calculated following that payment? In particular, do partial payments first cover interest or the principal amount? Is there any provision or legal practice similar to Art. 86(3)(2) of the rules of application of Regulation 966/2012 on the financial rules applicable to the general budget of the Union where it is stated that “Any partial payments shall first cover the interest”?**

(UK.26) This issue appears to be unregulated in English law.

**2.9. Please calculate interest in the following hypothetical case. All dates are given in the format dd.mm.yyyy. All amounts are stated without specifying the currency to abstract from implications of the introduction of the common Euro currency. Assume that the claims have not been time barred. Assume that a national court in the Member State on which you are reporting has jurisdiction to rule on the case. Assume that the cartelists are jointly liable for the damage caused by the cartel. If results differ materially depending on whether accrual of interest is based purely on national law or made in compliance with the EU principle of full compensation, provide both calculations.**

There was a long running pan-European cartel for a product that materially affected trade between Member States. The cartel lasted from the beginning of 1993 until the dawn raids (unannounced inspections) of the European Commission on 02.02.2009.

On 30.11.2010, a longtime customer of the cartel, who bought the cartelised product in the Member State on which you are reporting, brings a claim for damages against three cartelists (A, B, and C). All of the three defendants have their seat in the Member State on which you are reporting. The customer only bought the cartelised product of the cartelists A and B. In the writ, the claimant specifies the damages caused by the cartel and the date on which the respective damage occurred. The claimant also specifically requests that interest be paid on the damages. The damages (always = 100) and respective dates are set out in Table 2 below. Should a subjective rate be of relevance, you will find the ROI (Return On Investment) rates of the claimant and the three defendants in Table 3 below. You will also find the average interest rate that the claimant had to pay on credit taken out in that year (claimant's average refinance rate).

On 26.11.2013 a court renders a final judgment, ordering the defendant(s) to pay damages and interest. The defendants take until 12.02.2014 to pay. Please specify the total amount the jointly liable defendants have to pay on 12.02.2014 in order to relinquish their debt towards the claimant.

Table 2 - Damages Amounts and Dates

Date	Interest
15/11/1993	100
17/09/1996	100
22/02/2006	100
12/08/2008	100

Table 3 - Refinance and Return on Investment Rates

Year	Claimant's Refinance Rate	Claimant's Annual ROI	Defendant's A Annual ROI	Defendant's B Annual ROI	Defendant's C Annual ROI
1993	6.00%	5.50%	4.00%	4.00%	3.00%
1994	6.00%	9.80%	4.00%	4.00%	4.00%
1995	6.00%	9.50%	4.00%	4.00%	5.00%
1996	6.00%	1.00%	0.00%	0.00%	0.00%
1997	8.00%	-3.80%	1.00%	1.00%	3.00%
1998	8.00%	1.10%	4.00%	4.00%	5.00%
1999	8.00%	2.80%	1.00%	1.00%	3.00%
2000	8.00%	1.10%	-2.00%	-1.00%	0.00%
2001	8.00%	4.51%	2.00%	2.00%	3.00%
2002	8.00%	5.30%	4.00%	4.00%	5.00%
2003	8.00%	8.21%	9.00%	9.00%	9.00%
2004	7.00%	9.00%	3.00%	3.00%	2.00%
2005	7.00%	10.00%	1.00%	1.00%	1.00%
2006	7.00%	6.00%	1.00%	1.00%	1.00%
2007	5.00%	-5.00%	4.00%	4.00%	2.00%
2008	5.00%	-7.00%	-1.00%	0.00%	0.00%
2009	5.00%	-5.00%	2.00%	2.00%	4.00%
2010	5.00%	-3.00%	4.00%	4.00%	4.00%
2011	5.00%	-2.70%	4.00%	4.00%	2.00%
2012	5.00%	1.61%	-2.00%	-1.00%	0.00%
2013	5.00%	4.40%	8.00%	8.00%	7.00%
2014	5.00%	1.41%	-4.00%	-3.00%	-1.00%

(UK.27) Since the question of interest is a matter of an almost absolute discretion on the part of the court, in the worst case scenario the claimant would not be awarded any interest. If the approach of the CAT from the competition law cases decided so far<sup>748</sup> was to be followed, the claimant would be awarded simple interest at a rate of 2.00 per cent above the base rate, which would add up to 274.21 interest on damages (provided that interest was to be calculated for the whole period from the day damage arose to the point of judgment). From the point of judgment to actual payment (so from 26.11.2013 to 12.02.2014), interest on judgment debt (amounting to 674.21) at the level of 8.00 per cent per annum would add up to 11.53 (so the sum ultimately to be paid would be 685.73).

<sup>748</sup> Cf. question 15.

(UK.28) If the claimant could evidence his loss, they could also try to seek interest as damages at common law and thus try to recover compound interest (precise calculation would depend on the actual loss).

## Damage 1

From	To	Amount	Interest Rate	Total Days	Interest
15/11/1993	22/11/1993	100	7.8750%	8	0.17
23/11/1993	07/02/1994	100	7.3750%	77	1.56
08/02/1994	11/09/1994	100	7.1250%	216	4.22
12/09/1994	06/12/1994	100	7.6250%	86	1.80
07/12/1994	01/02/1995	100	8.1250%	57	1.27
02/02/1995	12/12/1995	100	8.6250%	314	7.42
13/12/1995	31/12/1995	100	8.3750%	36	0.83
01/01/1996	17/01/1996	100	8.3750%	17	0.39
18/01/1996	07/03/1996	100	8.1250%	50	1.11
08/03/1996	05/06/1996	100	7.9375%	90	1.95
06/06/1996	29/10/1996	100	7.6875%	146	3.07
30/10/1996	31/12/1996	100	7.9375%	63	1.37
01/01/1997	05/05/1997	100	7.9375%	125	2.72
06/05/1997	05/06/1997	100	8.2500%	31	0.70
06/06/1997	09/07/1997	100	8.5000%	34	0.79
10/07/1997	06/08/1997	100	8.7500%	28	0.67
07/08/1997	05/11/1997	100	9.0000%	91	2.24
06/11/1997	03/06/1998	100	9.2500%	210	5.32
04/06/1998	07/10/1998	100	9.5000%	126	3.28
08/10/1998	04/11/1998	100	9.2500%	28	0.71
05/11/1998	09/12/1998	100	8.7500%	35	0.84
10/12/1998	06/01/1999	100	8.2500%	28	0.63
07/01/1999	03/02/1999	100	8.0000%	28	0.61
04/02/1999	07/04/1999	100	7.5000%	63	1.29
08/04/1999	09/06/1999	100	7.2500%	63	1.25
10/06/1999	07/09/1999	100	7.0000%	90	1.73
08/09/1999	03/11/1999	100	7.2500%	57	1.13
04/11/1999	31/12/1999	100	7.5000%	58	1.19
01/01/2000	12/01/2000	100	7.5000%	12	0.25
13/01/2000	09/02/2000	100	7.7500%	28	0.59
10/02/2000	31/12/2000	100	8.0000%	326	7.13
01/01/2001	07/02/2001	100	8.0000%	38	0.83
08/02/2001	04/04/2001	100	7.7500%	56	1.19
05/04/2001	09/05/2001	100	7.5000%	35	0.72
10/05/2001	01/08/2001	100	7.2500%	84	1.67
02/08/2001	17/09/2001	100	7.0000%	47	0.90
18/09/2001	03/10/2001	100	6.7500%	16	0.30
04/10/2001	07/11/2001	100	6.5000%	35	0.62

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08/11/2001	05/02/2003	100	6.0000%	455	7.48
06/02/2003	09/07/2003	100	5.7500%	154	2.43
10/07/2003	05/11/2003	100	5.5000%	119	1.79
06/11/2003	31/12/2003	100	5.7500%	91	1.43
01/01/2004	04/02/2004	100	5.7500%	126	1.98
05/02/2004	05/05/2004	100	6.0000%	91	1.49
06/05/2004	09/06/2004	100	6.2500%	35	0.60
10/06/2004	04/08/2004	100	6.5000%	56	0.99
05/08/2004	31/12/2004	100	6.7500%	149	2.75
01/01/2005	03/08/2005	100	6.7500%	215	3.98
04/08/2005	02/08/2006	100	6.5000%	364	6.48
03/08/2006	08/11/2006	100	6.7500%	98	1.81
09/11/2006	10/01/2007	100	7.0000%	63	1.21
11/01/2007	09/05/2007	100	7.2500%	119	2.36
10/05/2007	04/07/2007	100	7.5000%	56	1.15
05/07/2007	05/12/2007	100	7.7500%	154	3.27
06/12/2007	31/12/2007	100	7.5000%	26	0.53
01/01/2008	06/02/2008	100	7.5000%	37	0.76
07/02/2008	09/04/2008	100	7.2500%	63	1.25
10/04/2008	07/10/2008	100	7.0000%	181	3.46
08/10/2008	05/11/2008	100	6.5000%	29	0.52
06/11/2008	03/12/2008	100	5.0000%	28	0.38
04/12/2008	31/12/2008	100	4.0000%	28	0.31
01/01/2009	07/01/2009	100	4.0000%	7	0.08
08/01/2009	04/02/2009	100	3.5000%	28	0.27
05/02/2009	04/03/2009	100	3.0000%	28	0.23
05/03/2009	31/12/2009	100	2.5000%	302	2.07
01/01/2010	31/12/2010	100	2.5000%	365	2.50
01/01/2011	31/12/2011	100	2.5000%	365	2.50
01/01/2012	31/12/2012	100	2.5000%	366	2.50
01/01/2013	26/11/2013	100	2.5000%	329	2.25
Total Interest (D.1)				125.26	

Damage 2

From	To	Amount	Interest Rate	Total Days	Interest
17/09/1996	29/10/1996	100	7.6875%	43	0.90
30/10/1996	31/12/1996	100	7.9375%	63	1.37
01/01/1997	05/05/1997	100	7.9375%	125	2.72
06/05/1997	05/06/1997	100	8.2500%	31	0.70
06/06/1997	09/07/1997	100	8.5000%	34	0.79
10/07/1997	06/08/1997	100	8.7500%	28	0.67
07/08/1997	05/11/1997	100	9.0000%	91	2.24
06/11/1997	03/06/1998	100	9.2500%	210	5.32

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04/06/1998	07/10/1998	100	9.5000%	126	3.28
08/10/1998	04/11/1998	100	9.2500%	28	0.71
05/11/1998	09/12/1998	100	8.7500%	35	0.84
10/12/1998	06/01/1999	100	8.2500%	28	0.63
07/01/1999	03/02/1999	100	8.0000%	28	0.61
04/02/1999	07/04/1999	100	7.5000%	63	1.29
08/04/1999	09/06/1999	100	7.2500%	63	1.25
10/06/1999	07/09/1999	100	7.0000%	90	1.73
08/09/1999	03/11/1999	100	7.2500%	57	1.13
04/11/1999	31/12/1999	100	7.5000%	58	1.19
01/01/2000	12/01/2000	100	7.5000%	12	0.25
13/01/2000	09/02/2000	100	7.7500%	28	0.59
10/02/2000	31/12/2000	100	8.0000%	326	7.13
01/01/2001	07/02/2001	100	8.0000%	38	0.83
08/02/2001	04/04/2001	100	7.7500%	56	1.19
05/04/2001	09/05/2001	100	7.5000%	35	0.72
10/05/2001	01/08/2001	100	7.2500%	84	1.67
02/08/2001	17/09/2001	100	7.0000%	47	0.90
18/09/2001	03/10/2001	100	6.7500%	16	0.30
04/10/2001	07/11/2001	100	6.5000%	35	0.62
08/11/2001	05/02/2003	100	6.0000%	455	7.48
06/02/2003	09/07/2003	100	5.7500%	154	2.43
10/07/2003	05/11/2003	100	5.5000%	119	1.79
06/11/2003	31/12/2003	100	5.7500%	91	1.43
01/01/2004	04/02/2004	100	5.7500%	126	1.98
05/02/2004	05/05/2004	100	6.0000%	91	1.49
06/05/2004	09/06/2004	100	6.2500%	35	0.60
10/06/2004	04/08/2004	100	6.5000%	56	0.99
05/08/2004	31/12/2004	100	6.7500%	149	2.75
01/01/2005	03/08/2005	100	6.7500%	215	3.98
04/08/2005	02/08/2006	100	6.5000%	364	6.48
03/08/2006	08/11/2006	100	6.7500%	98	1.81
09/11/2006	10/01/2007	100	7.0000%	63	1.21
11/01/2007	09/05/2007	100	7.2500%	119	2.36
10/05/2007	04/07/2007	100	7.5000%	56	1.15
05/07/2007	05/12/2007	100	7.7500%	154	3.27
06/12/2007	31/12/2007	100	7.5000%	26	0.53
01/01/2008	06/02/2008	100	7.5000%	37	0.76
07/02/2008	09/04/2008	100	7.2500%	63	1.25
10/04/2008	07/10/2008	100	7.0000%	181	3.46
08/10/2008	05/11/2008	100	6.5000%	29	0.52
06/11/2008	03/12/2008	100	5.0000%	28	0.38
04/12/2008	31/12/2008	100	4.0000%	28	0.31
01/01/2009	07/01/2009	100	4.0000%	7	0.08
08/01/2009	04/02/2009	100	3.5000%	28	0.27

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05/02/2009	04/03/2009	100	3.0000%	28	0.23
05/03/2009	31/12/2009	100	2.5000%	302	2.07
01/01/2010	31/12/2010	100	2.5000%	365	2.50
01/01/2011	31/12/2011	100	2.5000%	365	2.50
01/01/2012	31/12/2012	100	2.5000%	366	2.50
01/01/2013	26/11/2013	100	2.5000%	329	2.25
Total Interest (D.2)					<b>102.39</b>

**Damage 3**

From	To	Amount	Interest Rate	Total Days	Interest
22/02/2006	02/08/2006	100	6.5000%	162	2.88
03/08/2006	08/11/2006	100	6.7500%	98	1.81
09/11/2006	10/01/2007	100	7.0000%	63	1.21
11/01/2007	09/05/2007	100	7.2500%	119	2.36
10/05/2007	04/07/2007	100	7.5000%	56	1.15
05/07/2007	05/12/2007	100	7.7500%	154	3.27
06/12/2007	31/12/2007	100	7.5000%	26	0.53
01/01/2008	06/02/2008	100	7.5000%	37	0.76
07/02/2008	09/04/2008	100	7.2500%	63	1.25
10/04/2008	07/10/2008	100	7.0000%	181	3.46
08/10/2008	05/11/2008	100	6.5000%	29	0.52
06/11/2008	03/12/2008	100	5.0000%	28	0.38
04/12/2008	31/12/2008	100	4.0000%	28	0.31
01/01/2009	07/01/2009	100	4.0000%	7	0.08
08/01/2009	04/02/2009	100	3.5000%	28	0.27
05/02/2009	04/03/2009	100	3.0000%	28	0.23
05/03/2009	31/12/2009	100	2.5000%	302	2.07
01/01/2010	31/12/2010	100	2.5000%	365	2.50
01/01/2011	31/12/2011	100	2.5000%	365	2.50
01/01/2012	31/12/2012	100	2.5000%	366	2.50
01/01/2013	26/11/2013	100	2.5000%	329	2.25
Total Interest (D.3)					<b>32.29</b>

**Damage 4**

From	To	Amount	Interest Rate	Total Days	Interest
12/08/2008	03/12/2008	100	5.0000%	114	1.56
04/12/2008	31/12/2008	100	4.0000%	28	0.31
01/01/2009	07/01/2009	100	4.0000%	7	0.08
08/01/2009	04/02/2009	100	3.5000%	28	0.27
05/01/2009	04/03/2009	100	3.0000%	28	0.23

05/03/2009	31/12/2009	100	2.5000%	302	2.07
01/01/2010	31/12/2010	100	2.5000%	365	2.50
01/01/2011	31/12/2011	100	2.5000%	365	2.50
01/01/2012	31/12/2012	100	2.5000%	366	2.50
01/01/2013	26/11/2013	100	2.5000%	329	2.25
Total Interest (D.4)					14.26

Total Interest (D.1 - D.4)	274.21
Total (D.1 - D.4)	674.21

From	To	Amount	Interest Rate	Total Days	Interest
27/11/2013	12/02/2014	674.21	8.0000%	78	11.53

Total Debt	685.73
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### Section III. Procedural Aspects

#### 3.1. Does the judge award interest *ex officio* or does the claimant have to request it?

(UK.29) The claimant is expected to request interest, but in theory the courts may award interest of their own motion.

#### 3.2. Can the judge award a higher interest amount than requested by the claimant or does the principle of *ne ultra petita* apply?

(UK.30) Yes, award of interest is at a courts' discretion, so in theory it could happen.

#### 3.3. Can the judge estimate interest or does interest always have to be calculated?

(UK.31) The precise calculation of interest can be left to the parties.

#### 3.4. If the claimant changes the request regarding the interest, is this regarded as an amendment of the pleadings? Is this only possible until a certain stage into the proceedings and precluded later on or can the claimant make such changes without negative procedural consequences at any time up to the judgment?

(UK.32) Any interest requests should be included in the claim form, which can be amended only with a written consent of all the parties or with the court's/CAT's permission.<sup>749</sup>

<sup>749</sup> CAT Rule 34; CPR 17.1(2) applying in respect of served statements of case. Cases which have not been served can generally be amended without the court's permission (CPR 17.1(1)), subject to the court's power to disallow amendment (CPR 17.2).



#### Section IV. Specific Instances

#### 4.1. Identify any cases relating to damages claims for infringements of competition law and explain how interest was calculated. In writing these summaries, provide all relevant information about how interest was calculated, so that this information can be passed on to another country reporter who can try and estimate how interest would be calculated in another jurisdiction.

(UK.33) To date, only two CAT follow-on decisions dealt with the question of interest on damages.

i. **2 Travel Group Plc (in liquidation) v Cardiff City Transport Services Limited**<sup>750</sup>

**Facts:** It was a follow-on action under Section 47A of the Competition Act 1998 based on an earlier finding by the Office of Fair Trading that Cardiff City Transport Services infringed Chapter II prohibition by engaging in predatory pricing against 2 Travel Group amounting to an abuse of a dominant position. 2 Travel claimed damages together with interest on six different heads (loss of a capital asset, loss of a commercial opportunity, wasted staff and management time expended by 2 Travel during the infringement, costs relating to 2 Travel's liquidation and exemplary damages).

**Judgment:** Damages for lost profit (at a sum of £33,818.79) and exemplary damages were awarded (£60,000.00). Interest was awarded only on damages for lost profit at a rate of 2.00 per cent above the Bank of England base rate at the relevant time. This was later agreed by the parties to amount to £13,311.70 - a separate formal order was made to that effect, also specifying that interest would continue to accrue at a daily rate of £2.32 until payment.<sup>751</sup> The CAT did not consider it appropriate to award any interest on exemplary damages since the purpose of interest was purely compensatory. The rate of interest claimed by 2 Travel (simple interest at 8.00 per cent or, in the alternative, compound interest at 1.00 per cent above LIBOR) was considered too high. The intentional nature of the breach was not considered a relevant factor in deciding the rate of interest.

**Relevant point:** In awarding interest at a rate of 2.00 per cent over Bank of England base rate the CAT departed from the general commercial practice. However, it failed to provide an explanation for this departure. It also clarified that the purpose of awarding interest is purely compensatory.

ii. **Albion Water v Dŵr Cymru Cyfyngedig**<sup>752</sup>

**Facts:** It was a follow-on action under Section 47A of the Competition Act 1998 based on an earlier decision that Dŵr Cymru Cyfyngedig breached a Chapter II prohibition by effecting a margin squeeze on Albion Water that was excessive and unfair. The case concerned the price at which Dŵr Cymru was prepared to offer Albion a common carriage service to carry water through its pipes. Albion claimed that it suffered loss under three heads as a result of Dŵr Cymru's abuse of a dominant position: loss of profit under an existing contract, loss of opportunity and exemplary damages. Albion sought simple interest at 8.00 per cent or, in the alternative, compound interest at 1.00 per cent above LIBOR.

**Judgment:** Damages in the amount of £1,694,343.50 and £160,149.66 respectively were awarded under the first two heads of damage, but the claim for exemplary damages was rejected. Interest was awarded on both sums. The CAT did not consider it appropriate to award compound interest in this case, and instead it followed the approach from *2 Travel* and awarded interest at 2.00 per cent above Bank of England base rate in force from 26 January 2005 on the first sum and from 20 July 2006 on the second

<sup>750</sup> [2012] CAT 19.

<sup>751</sup> Case No. 1178/5/7/11, Order of the Chairman of 25 July 2012.

<sup>752</sup> [2013] CAT 6.

sum.<sup>753</sup> By setting the dates in this way the CAT did not accept Albion's claim for interest from the date of the infringement to the date of the judgment. Instead, interest was awarded from mid-point of the period for which damages were awarded to the date of payment. In the words of the CAT this was because "*the loss was not suffered on one day but over the period when Albion would have earned the increased revenues from supplying [Albion's customer] pursuant to common carriage arrangements*".

**Relevant point:** It is a second case before CAT in which it awarded interest at 2.00 per cent over Bank of England base rate without providing an explanation for doing so other than that of following *2 Travel*. It is also interesting for the way it decided the period over which interest was to be calculated.

Furthermore, in *Healthcare at Home Limited v Genzyme Limited*<sup>754</sup> the CAT made an interim award of damages, but no interest was awarded on that sum despite it being sought. The case was ultimately settled.

Despite a growing number of cases reaching the ordinary courts<sup>755</sup>, to date no final judgment awarding damages has been given. At one point in the *Courage v Intreprenneur* saga the court ruled on the issue of interest on damages (which was to be set at 3.5 per cent above the base rate, that rate being considered appropriate for small businesses on the basis of adduced evidence)<sup>756</sup>, but that was subject to a stay on the payment of damages pending further proceedings. Ultimately the claimant was held not to be entitled to damages<sup>757</sup>. The House of Lords decision did not deal with the key issues on quantification of damages and instead concentrated on other grounds of appeal, thus the question of interest was not addressed.

As a matter of general law, there appear to be no special rules for the calculation of interest where the damage occurred a long time before the claim is brought, apart from possible account being taken of the delay in bringing the claim (see above, question 9). Moreover, *Albion Water* demonstrates that the time from which interest is calculated can be other than the time when the cause of action arose where damage was a continuous one.

**4.2. Are the rules on the award of interest specific to the kinds of claim or general principles? Are there any specific approaches/rules that you can identify in national or EU competition cases, or in other cases where the claim is brought by business against business (B2B) and are there any specific approaches/rules in business versus consumer (B2C) cases?**

(UK.34) Rules on the award of interest are general principles and are not specific to the type of claim. No distinction is made between claims in contract and claims in tort.

(UK.35) Since the rate of interest is aimed to reflect the cost of borrowing, it is not inconceivable that the courts would treat B2C cases differently from B2B cases. A more generous rate of interest in *Courage v Intreprenneur* (discussed above) seemed to be reflective of the fact that it was a small business. This in turn suggests that B2C cases might also be treated differently.

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<sup>753</sup> Chairman's order made pursuant to the judgment did not contain a specific calculation of interest.

<sup>754</sup> [2006] CAT 29.

<sup>755</sup> According to Barry, J.R. (2012), *Comparative Private Enforcement and Collective Redress in the EU 1999-2012* (available online at <http://www.clcpecreu.co.uk/pdf/final/UK%20report.pdf>) 106 judgments were given in 80 competition related disputes between 1999 and 2012.

<sup>756</sup> [2004] EWCA Civ 895.

<sup>757</sup> [2007] 1 AC 333; The House of Lords decision re-instated the High Court decision of Parker J.

**Section V. Evaluation, Interpretation in conformity with EU Law, and Intertemporal Aspect**

**5.1. How satisfactory are the rules on the calculation of interest perceived to be? In considering this question, identify any law reform proposals in the last 15 years or so, or any major judgments by the higher courts that call into question or change some of the issues pertaining to the award of damages. Please identify changes of relevant national law on interest that will come into force or are currently considered.**

(UK.36) Two reform proposals were prepared by the Law Commission, one dating back to 1978<sup>758</sup>, and the other to 2004.<sup>759</sup> Recommendations from the latter were initially accepted, but the Bill was eventually dropped.<sup>760</sup> The main postulate of the 2004 Report was to introduce compound interest and a specified rate (1.00 per cent above Bank of England base rate) while leaving some discretion to the courts to depart from those presumptions. Inability of awarding compound interest in long-running cases was considered to lead to under-compensation of the claimants and a departure from commercial reality. In that sense the law on interest might be considered unsatisfactory. However, compound interest can be awarded at common law and in equity, somehow alleviating the problem. Also, there is nothing in the CAT Rules that would stop that CAT from awarding compound interest, although so far it has declined to do so. A reform which is underway will allow the CAT to hear also stand-alone cases<sup>761</sup>, thus opening the doors to arguments for compound interest in all kinds of competition infringement cases and not just follow-on cases.

**5.2. Assess the compliance of the national interest rules with the minimum standard prescribed by EU law set out above ('full compensation'). If national law does not grant full compensation, please try to identify an interpretation of national law that guarantees full compensation in conformity with European law. Given that the principle of full compensation is based on directly applicable EU law, please confirm that national courts have to apply it also in relation to past infringements of EU competition law (e.g. cartels starting in the 1990ies and ending in the 2000er years).**

(UK.37) An assessment of whether interest rates used by the courts/CAT offer full compensation would require an assessment of whether they correspond to real cost of borrowing. Certainly, this is what the courts are trying to achieve. However, the actual cost of borrowing might vary greatly depending on the type of case and on the borrowing capacity of the parties. While the courts use their discretion to vary interest awarded in some cases, CAT's guidance makes it clear that it will not look at a specific position of a particular claimant. This might suggest that in some cases full compensation will not be achieved.

(UK.38) The courts apply the same rules to all past infringements regardless of whether they concern national or EU competition law. The only major change in the law on interest in recent years was brought about by the *Sempra Metals* case<sup>762</sup>, which brought an end to years of conflicting judgments on availability of common law interest, but this will apply equally to past and new infringement cases.

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<sup>758</sup> LawCom No 88.

<sup>759</sup> LawCom No 287.

<sup>760</sup> Civil Law Reform Bill of 2010.

<sup>761</sup> *Supra* note 2.

<sup>762</sup> *Supra* note 3.

- 5.3. Regarding the secondary subject of investigation (interest on damages due to infringements of national competition law only), the proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union<sup>763</sup>, if adopted, would make the rules of European Law as outlined above applicable to infringements of national competition law. Art. 2 (Right to full compensation), para. 2 stipulates exactly those:

*“Full compensation shall place anyone who has suffered harm in the position in which that person would have been had the infringement not been committed. It shall therefore include compensation for actual loss and for loss of profit, and payment of interest from the time the harm occurred until the compensation in respect of that harm has actually been paid”.*

**Would the right to full compensation as set out by Art. 2 of the proposed directive apply to interest calculation for damages in cases where only national competition law has been infringed and the damage occurred before the implementation of the directive came into force?**

- (UK.39) The same rules on award of interest apply to breaches of national and EU competition law and these are meant to offer full compensation, so implementation of that element of the Directive would not require any changes to UK domestic law. The same rules would apply to claims from before and after implementation, unless English law on interest is authoritatively declared not to offer full compensation (on the question of compliance of national interest rules with the requirement to offer full compensation see above, question 17).

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<sup>763</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union*, 2013/0185 (COD), 11 June 2013.

